

NAVIGATING THE SUMMARY JUDGMENT MAZE

KIRSTEN M. CASTAÑEDA
Locke Lord Bissell & Liddell LLP

State Bar of Texas
NUTS AND BOLTS OF APPELLATE PRACTICE
September 9, 2009
Austin

TABLE OF CONTENTS

I. BEFORE GOING IN: PREPARING TO MOVE FOR SUMMARY JUDGMENT	1
II. ENTERING THE MAZE: DEADLINES FOR FILING SUMMARY JUDGMENT PAPERS.....	1
A. Notice Requirement for Motion	1
B. Ultimate Deadline to File Motion.....	2
C. Deadline for Filing Response	2
D. Deadline for Filing Reply.....	2
E. Deadline for Filing Objections	2
F. Deadline for Filing Exceptions.....	3
G. Calculating Summary Judgment Deadlines.....	3
1. General Principles	3
2. Effect of Filing or Service by Mail or Facsimile.....	3
3. Changing Deadlines by Rule 11 Agreement or Court Ruling	4
III. TURN ONE: DRAFTING THE MOTION, RESPONSE, AND REPLY	5
A. Grounds Stated in the Motion.....	5
B. Traditional Summary Judgment	5
C. No Evidence Summary Judgment	6
D. Hybrid Motion for Summary Judgment	7
E. Grounds Stated in the Response	7
1. Traditional Summary Judgment	7
2. No Evidence Summary Judgment	7
F. Grounds in the Reply.....	8
IV. TURN TWO: ASSEMBLING THE EVIDENCE	8
A. Pleadings.....	8
B. Form of Summary Judgment Evidence	8
C. Authentication	8
D. Hearsay	9
E. Interested Witness Affidavits (Including Experts)	9
F. Evidence Attached to a Hybrid Motion.....	10
V. TWIST: DRAFTING THE NOTICE OF HEARING.....	10
VI. TWIST: OBJECTIONS, OBTAINING LEAVE FOR LATE FILINGS, EXCEPTIONS, AND MOTIONS FOR CONTINUANCE	10
A. Objections to Evidence.....	10
1. Objections to Defects in Evidence.....	10
2. Requirement to Obtain Ruling on Objections	11
3. Requirement to Obtain Ruling on Objections Before the Summary Judgment Ruling	12
4. Objections to Expert Testimony	13
5. Objections to Late-Filed Evidence, and Obtaining Leave.....	13
6. Right to Opportunity to Correct Evidentiary Defects.....	13
B. Objections to Late-Filed or Late-Served Motions or Responses, and Obtaining Leave	14
C. Objections to Premature No Evidence Motion, and Requests for Continuance for Additional Discovery	15
1. Objection Based on Inadequate Time For Discovery.....	15
2. Objection Based on Need for Additional Discovery	15
3. Necessity of Ruling or Objection to Refusal to Rule	16

4. Objection Based on “Outstanding Discovery Issues”	16
D. Objection to No Evidence Motion by Party Bearing Burden of Proof on Claim or Defense.....	16
E. Objection to Unpleaded and/or Unverified Affirmative Defense.....	16
F. Exceptions	17
VII. TWIST: NEWLY ADDED CLAIMS OR DEFENSES.....	17
VIII. TURN THREE: OTHER PRESERVATION CONSIDERATIONS	18
IX. TURN FOUR: THE HEARING (OR SUBMISSION).....	18
X. TURN FIVE: THE DECISION	18
A. Traditional Summary Judgment	18
1. Movant = Plaintiff	19
2. Movant = Defendant.....	19
3. Scope of Review	19
B. No Evidence Summary Judgment	19
1. Legal Sufficiency Standard	20
2. Scope of Review.....	20
C. “Competing” vs. Parallel Summary Judgment Motions.....	20
XI. TWIST: FINALITY OF THE SUMMARY JUDGMENT	21
A. When is a summary judgment final?.....	21
B. What If I Can’t Tell Whether the Judgment is Final?	22
C. What Are My Options If the Order in My Case Is Not a Final Judgment?.....	23
XII. TURN SIX: APPEALING THE SUMMARY JUDGMENT	24
A. The Appellate Record and Consequences of Incompleteness	24
B. Standard and Scope of Review.....	25
1. Traditional Summary Judgment	25
2. No Evidence Summary Judgment	25
3. Other Applicable Standards of Review and Presumptions.....	25
4. “Competing” vs. Parallel Summary Judgment Motions.....	26
C. Issues for the Brief: General Judgments vs. Specific Judgments	26
1. General Judgments	26
2. Specific Judgments.....	27
a. The reviewing court should consider all grounds that the <i>appellee</i> preserves for appellate review and that are necessary to dispose of the appeal.....	27
b. Appellant should object to a specific judgment based on ground not in the motion below.....	27
D. A Few Words on Argument in the Brief	28
XIII. TWIST: DEFAULT SUMMARY JUDGMENT	28
XIV. TWIST: REVIEW OF DENIALS OF CERTAIN SUMMARY JUDGMENT MOTIONS	28
1. Interlocutory Appeals Under Section 51.014	28
2. Denial of a “Competing” Summary Judgment Motion	29
3. Interlocutory Appeal by “Agreement”	29

TABLE OF AUTHORITIES

CASES

<i>801 Nolana, Inc. v. RTC Mortgage Trust</i> , 944 S.W.2d 751 (Tex. App.—Corpus Christi 1997, writ denied)	8
<i>A.C. Collins Ford, Inc. v. Ford Motor Co.</i> , 807 S.W.2d 755 (Tex. App.—El Paso 1990, writ denied)	28
<i>Adams v. Tri-Continental Leasing Corp.</i> 713 S.W.2d 152 (Tex. App.—Dallas 1986, no writ)	19
<i>Ajibade v. Edinburg Gen’l Hosp.</i> , 22 S.W.3d 37 (Tex. App.—Corpus Christi-Edinburg 2000, pet. stricken)	14
<i>Alaniz v. Hoyt</i> , 105 S.W.3d 330 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.), <i>abrogated in part on other grounds by Fort Brown Villas III Condominium Ass’n v. Gillenwater</i> , 285 S.W.3d 879, 881-82 (Tex. 2009)	19
<i>Alashmawi v. IBP, Inc.</i> , 65 S.W.3d 162 (Tex. App.—Amarillo 2001, pets. denied)	7
<i>Alejandro v. Bell</i> , 84 S.W.3d 383 (Tex. App.—Corpus Christi-Edinburg 2002, no pet.)	17
<i>Allen v. Albin</i> , 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.)	11
<i>American Petrofina, Inc. v. Allen</i> , 887 S.W.2d 829 (Tex. 1994)	19
<i>Anderson v. Snider</i> , 808 S.W.2d 54 (Tex. 1991)	8, 9
<i>Anderson v. TU Elec.</i> , 2000 WL 567045 (Tex. App.—Dallas May 3, 2000, no pet.)	16
<i>Arnold v. Shuck</i> , 24 S.W.3d 470 (Tex. App.—Texarkana 2000, pet. denied)	4
<i>Art Institute of Chicago v. Integral Hedging, L.P.</i> , 129 S.W.3d 564 (Tex. App.—Dallas 2003, no pet.)	21
<i>In re B.I.V.</i> , 870 S.W.2d 12 (Tex. 1994)	18
<i>Bandera Elec. Coop., Inc. v. Gilchrist</i> , 946 S.W.2d 336 (Tex. 1997)	25
<i>Barrow v. Jack’s Catfish Inn</i> , 641 S.W.2d 624 (Tex. App.—Corpus Christi 1982, no writ)	8
<i>Bean v. Reynolds Realty Group, Inc.</i> , 192 S.W.3d 856 (Tex. App.—Texarkana 2006, no pet.)	6
<i>Benchmark Bank v. Crowder</i> , 919 S.W.2d 657 (Tex. 1996)	13, 14, 25
<i>Benger Builders, Inc. v. Business Credit Leasing, Inc.</i> , 764 S.W.2d 336 (Tex. App.—Houston [1 st Dist.] 1988, writ denied)	3
<i>Bennett v. Computer Assocs. Int’l</i> 932 S.W.2d 197 (Tex. App.—Amarillo 1996, writ denied)	27
<i>Binur v. Jacobo</i> , 135 S.W.3d 646 (Tex. 2004)	7, 20
<i>Birdwell v. Texins Credit Union</i> , 843 S.W.2d 246 (Tex. App.—Texarkana 1992, no writ)	2
<i>Blum v. Julian</i> , 977 S.W.2d 819 (Tex. App.—Fort Worth 1998, no pet.)	11, 12
<i>Bobbitt v. Cantu</i> , 992 S.W.2d 709 (Tex. App.—Austin 1999, no pet.)	21
<i>Bobbitt v. Stran</i> , 52 S.W.3d 734 (Tex. 2001)	23
<i>Brown v. Brown</i> , 145 S.W.3d 745 (Tex. App.—Dallas 2004, pet. denied)	10
<i>Brownlee v. Brownlee</i> , 665 S.W.2d 111 (Tex. 1984)	19
<i>In re Burlington Coat Factory Warehouse of McAllen, Inc.</i> 167 S.W.3d 827 (Tex. 2005)	21, 22
<i>Calhoun v. Killian</i> , 888 S.W.2d 51 (Tex. App.—Tyler 1994, writ denied)	26
<i>Callaghan Ranch, Ltd. v. Killam</i> , 53 S.W.3d 1 (Tex. App.—San Antonio 2000, pet. denied)	8
<i>Capstead Mortgage Corp. v. Sun Am. Mortgage Corp.</i> , 45 S.W.3d 233 (Tex. App.—Amarillo 2001, no pet.)	22
<i>Carbon El Norteno, L.L.C. v. Sanchez</i> , 2008 WL 3971554 (Tex. App.—Corpus Christi-Edinburg Aug. 28, 2008, no pet.) (mem. op.)	23
<i>Carpenter v. Cimarron Hydrocarbons Corp.</i> , 98 S.W.3d 682 (Tex. 2002)	28

<i>Carter v. MacFadyen</i> , 93 S.W.3d 307 (Tex. App.—Houston [14 th Dist.] 2002, pet. denied)	15
<i>Casey v. Interstate Building Maintenance, Inc.</i> , 2000 WL 422901 (Tex. App.—Austin Apr. 10, 2000, no pet.).....	16
<i>Cassingham v. Lutheran Sunburst Health Serv.</i> , 748 S.W.2d 589 (Tex. App.—San Antonio 1988, no writ)	26
<i>Casso v. Brand</i> , 776 S.W.2d 551 (Tex. 1989)	9
<i>Ceballos v. El Paso Health Care Sys.</i> 881 S.W.2d 439 (Tex. App.—El Paso 1994, writ denied)	9
<i>Centeq Realty, Inc. v. Siegler</i> , 899 S.W.2d 195 (Tex. 1995)	5
<i>Chapman Children's Tr. v. Porter & Hedges, L.L.P.</i> , 32 S.W.3d 429, 436 n. 4 (Tex. App.—Houston [14 th Dist.] 2000, pet. denied).....	11
<i>Cherokee Water Co. v. Forderhause</i> , 641 S.W.2d 522 (Tex. 1982).....	23
<i>Cherokee Water Co. v. Ross</i> , 698 S.W.2d 363 (Tex. 1985).....	21
<i>Choctaw Properties, L.L.C. v. Aledo Indep. Sch. Dist.</i> , 127 S.W.3d 235 (Tex. App.—Waco 2003, no pet.).....	12
<i>Choucroun v. Sol L. Wisenberg Ins. Ag.-Life & Health Div., Inc.</i> , 2004 WL 2823147 (Tex. App.—Houston [1 st Dist.] Dec. 9, 2004, no pet.) (mem. op.) (scheduling order)	2
<i>Cincinnati Life Ins. Co. v. Cates</i> , 927 S.W.2d 623 (Tex. 1996)	27
<i>City of Denison v. Odle</i> , 808 S.W.2d 153 (Tex. App.—Dallas 1991), <i>rev'd on other grounds</i> , 833 S.W.2d 935 (Tex. 1992)	29
<i>City of Houston Fire Fighters' v. Morris</i> , 949 S.W.2d 474 (Tex. App.—Houston [14 th Dist.] 1997, pet. denied)	27
<i>City of Houston v. Clear Creek Basin Auth.</i> , 589 S.W.2d 671 (Tex. 1979).....	7, 10, 12, 18, 19
<i>City of Houston v. Howard</i> , 786 S.W.2d 391 (Tex. App.—Houston [14 th Dist.] 1990, writ denied)	6
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005)	18, 19, 20, 25
<i>Clarendon Nat'l Ins. Co. v. Thompson</i> , 199 S.W.3d 482 (Tex. App.—Houston [1 st Dist.] 2006, no pet.).....	18, 19
<i>Clendennen v. Williams</i> , 896 S.W.2d 257 (Tex. App.—Texarkana 1995, no writ).....	3
<i>Coffey v. Johnson</i> , 142 S.W.3d 414 (Tex. App.—Eastland 2004, no pet.)	6
<i>Columbia Rio Grande Regional Hosp. v. Stover</i> , 17 S.W.3d 387 (Tex. App.—Corpus Christi 2000, no pet.).....	11
<i>Continental Airlines, Inc. v. Kiefer</i> , 920 S.W.2d 274 (Tex. 1996).....	6
<i>Craddock v. Sunshine Bus Lines</i> , 134 Tex. 388, 133 S.W.2d 124 (1939)	28
<i>Crocker v. Paulyne's Nursing Home, Inc.</i> 95 S.W.3d 416 (Tex. App.—Dallas 2002, no pet.)	8, 12
<i>Cruikshank v. Consumer Direct Mortgage, Inc.</i> , 138 S.W.3d 497 (Tex. App.—Houston [14 th Dist.] 2004, pet. denied)	26, 27
<i>Cuyler v. Minns</i> , 60 S.W.3d 209 (Tex. App.—Houston [14 th Dist.] 2000, pet. denied)	8
<i>D.B. v. K.B.</i> , 176 S.W.3d 343 (Tex. App.—Houston [1 st Dist.] 2004, pet. denied).....	4
<i>Dallas County v. Rischon Dev. Corp.</i> , 242 S.W.3d 90 (Tex. App.—Dallas 2007, pets. denied)	2
<i>Daniell v. Citizens Bank</i> , 754 S.W.2d 407 (Tex. App.—Corpus Christi 1988, no writ)	13, 19
<i>Davis v. Pletcher</i> , 727 S.W.2d 29 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.)	27
<i>Dear v. City of Irving</i> , 902 S.W.2d 731 (Tex. App.—Austin 1995, writ denied).....	6
<i>Delfino v. Perry Homes</i> , 223 S.W.3d 32 (Tex. App.—Houston [1 st Dist.] 2006, no pet.).....	11
<i>Dolcefino v. Randolph</i> , 19 S.W.3d 906 (Tex. App.—Houston [14 th Dist.] 2000, pet. denied).....	12
<i>Dubose v. Worker's Med., P.A.</i> 117 S.W.3d 916 (Tex. App.—Houston [14 th Dist.] 2003, no pet.).....	18
<i>E.I. du Pont de Nemours & Co., Inc. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995).....	9
<i>Enterprise Leasing Co. v. Barrios</i> , 156 S.W.3d 547 (Tex. 2004).....	24
<i>In re Estate of Loveless</i> , 64 S.W.3d 564 (Tex. App.—Texarkana 2001, no pet.).....	11

<i>In re Estate of Swanson</i> , 130 S.W.3d 144 (Tex. App.—El Paso 2003, no pet.)	8
<i>Esty v. Beal Bank S.S.B.</i> , --- S.W.3d ---, 2009 WL 2506338 (Tex. App.—Dallas Aug. 18, 2009, no pet. h.)	2
<i>Evans v. First Nat’l Bank</i> 946 S.W.2d 367 (Tex. App.—Houston [14 th Dist.] 1997, writ denied)	27
<i>Extended Servs. Program, Inc. v. First Extended Serv. Corp.</i> , 601 S.W.2d 469 (Tex. App.—Dallas 1980, writ ref’d n.r.e.)	4
<i>EZ Pawn Corp. v. Mancias</i> , 934 S.W.2d 87 (Tex. 1996)	2
<i>First Nat’l Bank v. Fotjik</i> , 775 S.W.2d 632 (Tex. 1989)	13
<i>Flores v. Texas Prop. & Cas. Ins. Guar. Ass’n</i> , 167 S.W.3d 397 (Tex. App.—San Antonio 2005, pet. denied)	4, 15, 25
<i>Fluid Concepts, Inc. v. DA Apts. L.P.</i> , 159 S.W.3d 226 (Tex. App.—Dallas 2005, no pet.)	27
<i>FM Properties Operating Co. v. City of Austin</i> , 22 S.W.3d 868 (Tex. 2000)	20, 26
<i>Ford v. Exxon Mobil Chem. Co.</i> , 235 S.W.3d 615 (Tex. 2007)	22
<i>Fort Brown Villas III Condominium Ass’n v. Gillenwater</i> 285 S.W.3d 879 (Tex. 2009)	13, 19, 25
<i>Franco v. Slavonic Mut. Fire Ins. Ass’n</i> , 154 S.W.3d 777 (Tex. App.—Houston [14 th Dist.], no pet.)	17
<i>Fraud-Tech, Inc. v. Choicepoint, Inc.</i> , 102 S.W.3d 366 (Tex. App.—Fort Worth 2003, pet. denied)	4
<i>Frazier v. Yu</i> , 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied)	11
<i>Fredonia State Bank v. General Am. Life Ins. Co.</i> , 881 S.W.2d 279 (Tex. 1994)	27
<i>Friesenhahn v. Ryan</i> , 960 S.W.2d 656 (Tex. 1998)	18
<i>Gabaldon v. General Motors Corp.</i> , 876 S.W.2d 367 (Tex. App.—El Paso 1993, no writ)	15
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 713 (Tex. 1998)	9
<i>Garcia v. National Eligibility Express, Inc.</i> , 4 S.W.3d 887 (Tex. App.—Houston [1 st Dist.] 1999, no pet.)	10
<i>Garcia v. Willman</i> , 4 S.W.3d 307 (Tex. App.—Corpus Christi 1999, no pet.)	14
<i>Garza v. Serrato</i> , 699 S.W.2d 275 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.)	15
<i>Geiselman v. Cramer Fin. Group</i> , 965 S.W.2d 532 (Tex. App.—Houston [14 th Dist.] 1997, no writ)	3
<i>General Elec. Supply Co. v. Gulf Electroquip, Inc.</i> , 857 S.W.2d 591 (Tex. App.—Houston [1 st Dist.] 1993, writ denied)	6, 9, 26
<i>Golden Harvest Co. v. City of Dallas</i> , 942 S.W.2d 682 (Tex. App.—Tyler 1997, writ denied)	5
<i>Golden Triangle Energy v. Wickes Lumber</i> , 725 S.W.2d 439 (Tex. App.—Beaumont 1987, no writ)	5
<i>Goodyear Tire & Rubber Co. v. Mayes</i> , 236 S.W.3d 754 (Tex. 2007)	20
<i>Goswami v. Metropolitan Savs. & Loan Ass’n</i> , 751 S.W.2d 487 (Tex. 1988)	14, 17
<i>Gregg v. Cecil</i> , 844 S.W.2d 851 (Tex. App.—Beaumont 1992, no writ)	15
<i>Guinn v. Zarsky</i> , 893 S.W.2d 13 (Tex. App.—Corpus Christi 1994, no writ)	4, 10, 14
<i>H.S.M. Acquisitions, Inc. v. West</i> , 917 S.W.2d 872 (Tex. App.—Corpus Christi 1996, writ denied)	2, 25
<i>Hailey v. KTBS, Inc.</i> , 935 S.W.2d 857 (Tex. App.—Texarkana 1996, no writ)	26
<i>Hall v. Stephenson</i> , 919 S.W.2d 454 (Tex. App.—Fort Worth 1996, writ denied)	4
<i>Hamilton v. Wilson</i> , 249 S.W.3d 425 (Tex. 2008)	20
<i>Hanssen v. Our Redeemer Lutheran Church</i> , 938 S.W.2d 85 (Tex. App.—Dallas 1996, writ denied)	19
<i>Harrell v. Patel</i> , 225 S.W.3d 1 (Tex. App.—El Paso 2005, pet. denied)	10
<i>Harris County Toll Road Auth. v. Southwestern Bell Tel., L.P.</i> , 263 S.W.3d 48 (Tex. App.—Houston [1 st Dist.] 2006), <i>aff’d</i> , 282 S.W.3d 59 (Tex. 2009)	22
<i>Haynes v. Haynes</i> , 178 S.W.3d 350 (Tex. App.—Houston [14 th Dist.] 2005, pet. denied)	10

<i>HBO v. Harrison</i> , 983 S.W.2d 31 (Tex. App.—Houston [14 th Dist.] 1998, no pet.).....	28
<i>Hermann v. Lindsey</i> , 136 S.W.3d 286 (Tex. App.—San Antonio 2003, no pet.).....	16
<i>Hodde v. Portanova</i>	
2001 WL 224940 (Tex. App.—Houston [14 th Dist.] Mar. 8, 2001, no pet.).....	22
<i>Honea v. Morgan Drive Away, Inc.</i> , 997 S.W.2d 705 (Tex. App.—Eastland 1999, no pet.).....	17
<i>Hou-Tex, Inc. v. Landmark Graphics</i> , 26 S.W.3d 103 (Tex. App.—Houston [14 th Dist.] 2000, no pet.).....	10
<i>Humphrey v. Pelican Isle Owners Ass’n</i>	
238 S.W.3d 811 (Tex. App.—Waco 2007, no pet.).....	6, 7
<i>Hussong v. Schwan’s Sales Enters.</i> , 896 S.W.2d 320 (Tex. App.—Houston [1 st Dist.] 1995, no writ).....	17
<i>INA of Tex. v. Bryant</i> , 686 S.W.2d 614 (Tex. 1985).....	14, 25
<i>InvestIN.com Corp. v. Europa Int’l, Ltd.</i> , --- S.W.3d ---, 2009 WL 2232225 (Tex. App.—Dallas July 28, 2009, no pet. h.).....	6, 18
<i>J.E.M. v. Fidelity & Cas. Co.</i>	
928 S.W.2d 668 (Tex. App.—Houston [1 st Dist.] 1996, no writ).....	15
<i>Jacobs v. Satterwhite</i> , 65 S.W.3d 653 (Tex. 2001).....	23
<i>James v. Hitchcock Indep. Sch. Dist.</i> , 742 S.W.2d 701 (Tex. App.—Houston [1 st Dist.] 1987, writ denied).....	20, 21, 26, 29
<i>Jennings v. City of Dallas</i> , 138 S.W.3d 366 (Tex. App.—Dallas 2001), <i>rev’d on other grounds</i> , 142 S.W.3d 310 (Tex. 2004).....	7
<i>Joe v. Two Thirty Nine J.V.</i> , 145 S.W.3d 150 (Tex. 2004).....	25
<i>Johnson v. Brewer & Pritchard, P.C.</i> , 73 S.W.3d 193 (Tex. 2002).....	5, 6, 15, 25
<i>Jones v. Illinois Employers Ins.</i> , 136 S.W.3d 728 (Tex. App.—Texarkana 2004, no pet.).....	2, 4
<i>Jones v. Ray Ins. Ag.</i> , 59 S.W.3d 739 (Tex. App.—Corpus Christi-Edinburg 2001), <i>pet. denied</i> <i>per curiam</i> , 92 S.W.3d 530 (2002).....	11, 12
<i>Keeton v. Carrasco</i> , 53 S.W.3d 13 (Tex. App.—San Antonio 2001, <i>pet. denied</i>).....	12
<i>Kennedy v. Hyde</i> , 682 S.W.2d 525 (Tex. 1984).....	5
<i>Keszler v. Memorial Med. Ctr.</i>	
105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.).....	16, 25
<i>Kindred v. Con/Chem, Inc.</i> , 650 S.W.2d 61 (Tex. 1983).....	20
<i>King Ranch, Inc. v. Chapman</i> , 118 S.W.3d 742 (Tex. 2003).....	20, 25
<i>Laidlaw Waste Sys. v. City of Wilmer</i> , 904 S.W.2d 656 (Tex. 1995).....	8
<i>Lampasas v. Spring Ctr., Inc.</i>	
988 S.W.2d 428 (Tex. App.—Houston [14 th Dist.] 1999, no pet.).....	18
<i>Lee v. Haynes & Boone, L.L.P.</i> , 129 S.W.3d 192 (Tex. App.—Dallas 2004, <i>pet. denied</i>).....	15
<i>Lehmann v. HarCon Corp.</i> , 39 S.W.3d 191 (Tex. 2001).....	21, 22, 23
<i>Leinen v. Buffington’s Bayou City Serv. Co.</i> , 824 S.W.2d 682 (Tex. App.—Houston [14 th Dist.] 1992, no writ).....	17
<i>Levinthal v. Kelsey-Seybold Clinic, P.A.</i> , 902 S.W.2d 508 (Tex. App.—Houston [1 st Dist.] 1994, no writ).....	15
<i>Lewis v. Blake</i> , 876 S.W.2d 314 (Tex. 1994).....	1, 3, 4
<i>Limestone Constr., Inc. v. Summit Commercial Indus. Properties, Inc.</i> , 143 S.W.3d 538 (Tex. App.—Austin 2004, no pet.).....	28
<i>Litton Indus. Prods., Inc. v. Gammage</i> , 668 S.W.2d 319 (Tex. 1984).....	12
<i>Llopa, Inc. v. Nagel</i> , 956 S.W.2d 82 (Tex. App.—San Antonio 1997, <i>pet. denied</i>).....	8
<i>Lofton v. Allstate Ins. Co.</i> , 895 S.W.2d 693 (Tex. 1995).....	3, 4
<i>Lozano v. Lozano</i> , 52 S.W.3d 141 (Tex. 2001).....	20
<i>Lydick v. Rachal</i> , 2002 WL 31193440 (Tex. App.—Dallas Oct. 3, 2002, no pet.).....	4
<i>Lyons v. Lindsey Morden Claims Mgmt.</i> , 985 S.W.2d 86 (Tex. App.—El Paso 1998, no pet.).....	8

<i>M.D. Anderson Hosp. & Tumor Inst. v. Willrich</i> , 28 S.W.3d 22 (Tex. 2000)	18
<i>M.O. Dental Lab v. Rape</i> , 139 S.W.3d 671 (Tex. 2004).....	22
<i>Mack Trucks, Inc. v. Tamez</i> , 206 S.W.3d 572 (Tex. 2006).....	20
<i>Mafrige v. Ross</i> , 866 S.W.2d 590 (Tex. 1993), <i>overruled in part by Lehmann v. Har-Con Corp.</i> , 39 S.W.3d 191 (Tex. 2001)	22
<i>Malooly Bros. v. Napier</i> , 461 S.W.2d 119 (Tex. 1970)	26, 27
<i>Martin v. Durden</i> , 965 S.W.2d 562 (Tex. App.—Houston [14 th Dist.] 1997, <i>pet. denied</i>).....	10
<i>Martin v. Estates of Russell Creek Homeowners Ass’n</i> , 251 S.W.3d 899 (Tex. App.—Dallas 2008, <i>no pet.</i>).....	2, 3
<i>Martin v. Harris Cty. Appraisal Dist.</i> , 44 S.W.3d 190 (Tex. App.—Houston [14 th Dist.] 2001, <i>pet.</i> <i>denied</i>)	21
<i>Martinez v. City of San Antonio</i> , 40 S.W.3d 587 (Tex. App.-San Antonio 2001, <i>pet. denied</i>).....	15
<i>Mathis v. Bocell</i> , 982 S.W.2d 52 (Tex. App.—Houston [1 st Dist.] 1998, <i>no pet.</i>).....	10, 11
<i>Mathis v. Restoration Builders, Inc.</i> , 231 S.W.3d 47 (Tex. App.—Houston [14 th Dist.] 2007, <i>no</i> <i>pet.</i>).....	20, 25
<i>Mathis v. RKL Design/Build</i> 189 S.W.3d 839 (Tex. App.—Houston [1 st Dist.] 2006, <i>no pet.</i>)	13
<i>McConnell v. Southside Indep. Sch. Dist.</i> , 858 S.W.2d 337 (Tex. 1993)	3, 5, 6, 7, 17, 23, 27
<i>McCoy v. Rogers</i> , 240 S.W.3d 267 (Tex. App.—Houston [1 st Dist.] 2007, <i>pet. denied</i>).....	26, 27
<i>McNally v. Guevara</i> , 52 S.W.3d 195 (Tex. 2001)	23
<i>Mead v. RLMC, Inc.</i> , 225 S.W.3d 710 (Tex. App.—Fort Worth 2007, <i>pet. denied</i>)	11
<i>Merrell Dow Pharm., Inc. v. Havner</i> , 953 S.W.2d 706	9, 20, 25
<i>Merriweather v. King</i> , 2006 WL 2771866 (Tex. App.—Houston [14 th Dist.] Sept. 28, 2006, <i>no</i> <i>pet.</i>) (<i>mem. op.</i>)	22
<i>Michael v. Dyke</i> , 41 S.W.3d 746 (Tex. App.—Corpus Christi-Edinburg 2001, <i>no pet.</i>).....	7
<i>Mitchell v. Baylor Univ. Med. Ctr.</i> 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, <i>no pet.</i>)	11
<i>MMP, Ltd. v. Jones</i> , 710 S.W.2d 59 (Tex. 1986).....	19
<i>Moore v. Shoreline Ventures, Inc.</i> , 903 S.W.2d 900 (Tex. App.—Beaumont 1995, <i>no writ</i>)	26
<i>Morriss v. Enron Oil & Gas Co.</i> 948 S.W.2d 858 (Tex. App.—San Antonio 1997, <i>no writ</i>)	26, 27
<i>Morse v. Delgado</i> , 975 S.W.2d 378 (Tex. App.—Waco 1998, <i>no pet.</i>)	12, 13
<i>Mosser v. Plano Three Venture</i> , 893 S.W.2d 8 (Tex. App.—Dallas 1994, <i>no writ</i>)	10
<i>Myan Management Group, L.L.C. v. Adam Sparks Family Revocable Trust</i> , --- S.W.3d ---, 2009 WL 1875602 (Tex. App.—Dallas July 1, 2009, <i>no pet. h.</i>).....	6
<i>National Union Fire Ins. Co. v. CBI Indus., Inc.</i> , 907 S.W.2d 517 (Tex. 1995)	15
<i>Natividad v. Alexis, Inc.</i> , 875 S.W.2d 695 (Tex. 1994).....	18
<i>New York Underwriters Ins. Co. v. Sanchez</i> , 799 S.W.2d 677 (Tex. 1990)	21
<i>Nickerson v. E.I.L. Instruments, Inc.</i> , 817 S.W.2d 834 (Tex. App.—Houston [1 st Dist.] 1991, <i>no</i> <i>writ</i>)	14
<i>Nixon v. Mr. Property Mgmt.</i> , 690 S.W.2d 546 (Tex. 1985)	18, 25, 26
<i>Novak v. Stephens</i> , 596 S.W.2d 848 (Tex. 1980).....	28
<i>O’Kane v. Coleman</i> , 2008 WL 2579832 (Tex. App.—Houston [14 th Dist.] July 1, 2008, <i>no pet.</i>) (<i>mem. op.</i>)	18
<i>Ortiz v. Collins</i> , 203 S.W.3d 414 (Tex. App.—Houston [14 th Dist.] 2006, <i>no pet.</i>).....	5
<i>Padilla v. LaFrance</i> , 907 S.W.2d 454 (Tex. 1995).....	5
<i>Palacio v. AON Properties., Inc.</i> , 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, <i>no pet.</i>).....	11
<i>Peerenboom v. HSP Foods, Inc.</i> , 910 S.W.2d 156 (Tex. App.—Waco 1995, <i>no writ</i>)	14
<i>Pierson v. SMS Fin. II, L.L.C.</i> , 959 S.W.2d 343 (Tex. App.—Texarkana 1998, <i>no pet.</i>).....	24

<i>Plexchem Int'l, Inc. v. Harris Cty. Appraisal Dist.</i> , 922 S.W.2d 930 (Tex. 1996).....	26
<i>Positive Feed, Inc. v. Guthmann</i> 4 S.W.3d 879 (Tex. App.—Houston [1 st Dist.] 1999, no pet.).....	25
<i>Quanaim v. Frasco Restaurant & Catering</i> , 17 S.W.3d 30 (Tex. App.—Houston [14 th Dist.] 2000, pet. denied).....	8, 16
<i>Randall's Food Mkts., Inc. v. Johnson</i> , 891 S.W.2d 640 (Tex. 1995).....	19
<i>Restaurant Teams Int'l, Inc. v. MG Sec'ys Corp.</i> , 95 S.W.3d 336 (Tex. App.—Dallas 2002, no pet.).....	15, 25
<i>Reynolds v. Murphy</i> , 188 S.W.3d 252 (Tex. App.—Fort Worth 2006), <i>cert. denied</i> , 549 U.S. 1281 (2007).....	2, 3
<i>Rhima v. White</i> , 829 S.W.2d 909 (Tex. App.—Fort Worth 1992, writ denied).....	16
<i>Richard v. Reynolds Metal Co.</i> , 108 S.W.3d 908 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.).....	7
<i>Richardson v. Johnson & Higgins of Tex., Inc.</i> , 905 S.W.2d 9 (Tex. App.—Houston [1 st Dist.] 1995, writ denied).....	26
<i>Risner v. McDonald's Corp.</i> , 18 S.W.3d 903 (Tex. App.—Beaumont 2000, pet. denied).....	16
<i>Ritzell v. Espeche</i> , 87 S.W.3d 536 (Tex. 2002).....	22, 23
<i>Rizkallah v. Conner</i> , 952 S.W.2d 580 (Tex. App.—Houston [1 st Dist.] 1997, no writ).....	10
<i>Roark v. Stallworth Oil & Gas, Inc.</i> , 813 S.W.2d 492 (Tex. 1991).....	16
<i>Robertson v. Southwestern Bell Yellow Pages, Inc.</i> , 190 S.W.3d 899 (Tex. App.—Dallas 2006, no pet.).....	28
<i>Rocha v. Faltys</i> , 69 S.W.3d 315 (Tex. App.—Austin 2002, no pet.).....	15, 25
<i>Rogers v. Ricane Enters., Inc.</i> , 772 S.W.2d 76 (Tex. 1989).....	6
<i>Roob v. Von Bereghshasy</i> 866 S.W.2d 765 (Tex. App.—Houston [1 st Dist.] 1993, writ denied).....	14
<i>Rosas v. Hatz</i> , 147 S.W.3d 560 (Tex. App.—Waco 2004, no pet.).....	17
<i>Rotella v. Nelson Architectural Eng'rs, Inc.</i> 251 S.W.3d 216 (Tex. App.—Dallas 2008, no pet.).....	23
<i>Roth v. FFP Operating Partners, L.P.</i> 994 S.W.2d 190 (Tex. App.—Amarillo 1999, pet. denied).....	8
<i>Ryland Group v. Hood</i> , 924 S.W.2d 120 (Tex. 1996).....	8, 19
<i>Sadler v. Bank of Am.</i> , 2004 WL 1392325 (Tex. App.—San Antonio June 23, 2004, no pet.) (mem. op.).....	27
<i>Sams v. N.L. Indus.</i> , 735 S.W.2d 486 (Tex. App.—Houston [1 st Dist.] 1987, no writ).....	2
<i>Sanders v. Shelton</i> , 970 S.W.2d 721 (Tex. App.—Austin 1998, writ denied).....	25
<i>Schafer v. Federal Servs. Corp.</i> 875 S.W.2d 455 (Tex. App.—Houston [1 st Dist.] 1994, no writ.).....	19
<i>Science Spectrum, Inc. v. Martinez</i> , 941 S.W.2d 910 (Tex. 1996).....	23
<i>Seaman v. Seaman</i> , 686 S.W.2d 206 (Tex. App.—Houston [1 st Dist.] 1984, writ ref'd n.r.e.).....	21
<i>Seaway Prods. Pipeline Co. v. Hanley</i> 153 S.W.3d 643 (Tex. App.—Fort Worth 2004, no pet.).....	6
<i>Shannon v. Texas Gen'l Indem. Co.</i> , 889 S.W.2d 662 (Tex. App.—Houston [14 th Dist.] 1994, no writ).....	26
<i>Shelton v. Sargent</i> , 144 S.W.3d 113 (Tex. App.—Fort Worth 2004, pets. denied), <i>cert. denied</i> , 549 U.S. 1281 (2007).....	2, 3
<i>Simulis, L.L.C. v. General Elec. Capital Corp.</i> , 2008 WL 1747483 (Tex. App.—Houston [14 th Dist.] 2008, no pet.) (mem. op.).....	25
<i>Southland Corp. v. Lewis</i> , 940 S.W.2d 83 (Tex. 1997).....	9
<i>Specialty Retailers v. Fuqua</i> 29 S.W.3d 140 (Tex. App.—Houston [14 th Dist.] 2000, pet. denied).....	8
<i>Spradlin v. State</i> , 100 S.W.3d 372 (Tex. App.—Houston [1 st Dist.] 2002, no pet.).....	10

<i>St. Paul Companies v. Chevron U.S.A., Inc.</i> , 798 S.W.2d 4 (Tex. App.—Houston [1 st Dist.] 1990, writ dismissed).....	8
<i>Stary v. DeBord</i> , 967 S.W.2d 352 (Tex. 1998).....	21
<i>State Farm Fire & Cas. Co. v. S.S.</i> , 858 S.W.2d 374 (Tex. 1993).....	26
<i>Stephens v. Dolcefino</i> , 126 S.W.3d 120 (Tex. App.—Houston [1 st Dist.] 2003), <i>pet. denied</i> , 181 S.W.3d 741 (2005)	13
<i>Stephens v. Turtle Creek Apts., Ltd.</i> , 875 S.W.2d 25 (Tex. App.—Houston [14 th Dist.] 1994, no writ).....	4
<i>Sterner v. Marathon Oil Co.</i> , 767 S.W.2d 686 (Tex. 1989).....	27
<i>Stiles v. Resolution Trust Corp.</i> , 867 S.W.2d 24 (Tex. 1993).....	5, 25
<i>Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P.</i> , 114 S.W.3d 48 (Tex. App.—Eastland 2003, no <i>pet.</i>).....	11, 12
<i>Tanksley v. CitiCapital Commercial Corp.</i> , 145 S.W.3d 760 (Tex. App.—Dallas 2004, <i>pet. denied</i>).....	4, 10
<i>In re TCW Global Project Fund II, Ltd.</i> , 274 S.W.3d 166 (Tex. App.—Houston [14 th Dist.] 2008, <i>mand. filed</i>).....	26, 28
<i>Tello v. Bank One, N.A.</i> , 218 S.W.3d 109 (Tex. App.—Houston [14 th Dist.] 2007, no <i>pet.</i>).....	6, 7
<i>Tenneco Inc. v. Enterprise Prods. Co.</i> , 925 S.W.2d 640 (Tex. 1996)	15
<i>Texas First Nat’l Bank v. Ng</i> , 167 S.W.3d 842 (Tex. App.—Houston [14 th Dist.] 2005, <i>judgm’t vacated by agr.</i>)	24
<i>Texas Indus., Inc. v. Vaughan</i> , 919 S.W.2d 798 (Tex. App.—Houston [14 th Dist.] 1996, <i>writ denied</i>).....	12
<i>Thomas v. Cisneros</i> , 596 S.W.2d 313 (Tex. App.—Austin 1980, <i>writ ref’d n.r.e.</i>).....	6
<i>Toonen v. United Servs. Auto. Ass’n</i> 935 S.W.2d 937 (Tex. App.—San Antonio 1996, no writ).....	28
<i>Torres v. City of Waco</i> , 51 S.W.3d 814 (Tex. App.—Waco 2001)	7, 13
<i>Torres v. GSC Enters., Inc.</i> , 242 S.W.3d 553 (Tex. App.—Waco 2007, no <i>pet.</i>).....	13
<i>Totman v. Control Data Corp.</i> , 707 S.W.2d 739 (Tex. App.—Fort Worth 1986, no writ), <i>abrogated in part on other grounds by Ford Motor Co. v. Leggat</i> , 904 S.W.2d 643 (Tex. 1995).....	25
<i>Tri-Steel Structures, Inc. v. Baptist Found.</i> , 166 S.W.3d 443 (Tex. App.—Fort Worth 2005, <i>pet. denied</i>).....	13, 14
<i>Trico Techs. v. Montiel</i> , 949 S.W.2d 308 (Tex. 1997).....	9
<i>Trinity River Auth. v. URS Consultants, Inc.</i> , 889 S.W.2d 259 (Tex. 1994).....	5, 8
<i>Trusty v. Strayhorn</i> , 87 S.W.3d 756 (Tex. App.—Texarkana 2002, no <i>pet.</i>)	10, 12
<i>United Blood Servs. v. Longoria</i> , 938 S.W.2d 29 (Tex. 1997)	9, 10
<i>United Parcel Serv., Inc. v. Tasdemiroglu</i> , 25 S.W.3d 914 (Tex. App.—Houston 2000 <i>pet. denied</i>).....	28
<i>Upchurch v. Albear</i> , 5 S.W.3d 274 (Tex. App.—Amarillo 1999, <i>pet. denied</i>).....	6
<i>Utilities Pipeline Co. v. American Petrofina Mktg.</i> , 760 S.W.2d 719 (Tex. App.—Dallas 1988, no writ)	11
<i>Valence Operating Co. v. Dorsett</i> , 164 S.W.3d 656 (Tex. 2005).....	25
<i>Verkin v. Southwest Ctr. One, Ltd.</i> , 784 S.W.2d 92 (Tex. App.—Houston [1 st Dist.] 1989, <i>writ denied</i>).....	15
<i>Volvo Petroleum, Inc. v. Getty Oil Co.</i> , 717 S.W.2d 134 (Tex. App.—Houston [14 th Dist.] 1986, no writ).....	3
<i>Waite v. Woodard, Hall & Primm, P.C.</i> , 137 S.W.3d 277 (Tex. App.—Houston [1 st Dist.] 2004., no <i>pet.</i>).....	7
<i>Walker v. Harris</i> , 924 S.W.2d 375 (Tex. 1996).....	5
<i>Webster v. Allstate Ins. Co.</i> 833 S.W.2d 747 (Tex. App.—Houston [1 st Dist.] 1992, no writ).....	13, 14

<i>Well Solutions, Inc. v. Stafford</i> 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.).....	11
<i>Westchester Fire Ins. Co. v. Admiral Ins. Co.</i> , 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. denied)	27
<i>Westchester Fire Ins. Co. v. Alvarez</i> , 576 S.W.2d 771 (Tex. 1978), <i>overruled in part on other grounds by City of Houston v. Clear Creek Basin Auth.</i> , 589 S.W.2d 671 (Tex. 1979)	6
<i>Wheeler v. Green</i> , 157 S.W.3d 439 (Tex. 2005).....	14
<i>Wil-Roye Inv. Co. II v. Washington Mut. Bank</i> , 142 S.W.3d 393 (Tex. App.—El Paso 2004, no pet.).....	2
<i>Williams v. Bank One</i> , 15 S.W.3d 110 (Tex. App.—Waco 1999, no pet.)	8, 16
<i>Winn v. Martin Homebuilders, Inc.</i> 153 S.W.3d 553 (Tex. App.—Amarillo 2004, pet. denied).....	2
<i>Woods Expl. & Producing Co. v. Arkla Equip. Co.</i> , 528 S.W.2d 568 (Tex. 1975)	26
<i>Wright v. Lewis</i> , 777 S.W.2d 520 (Tex. App.—Corpus Christi 1989, writ denied)	3, 4
<i>Wyndham Int’l., Inc. v. Ace Am. Ins. Co.</i> , 186 S.W.3d 682 (Tex. App.—Dallas 2006, no pet.).....	9
<i>Yancy v. United Surgical Partners Int’l</i> , 236 S.W.3d 778 (Tex. 2007)	18, 19

STATUTES AND RULES

DALLAS (TEX.) CIV. DIST. CT. LOC. R. 2.09.....	2
TEX. CIV. PRAC. & REM. CODE § 38.004.....	6
TEX. CIV. PRAC. & REM. CODE § 51.014.....	28
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5), (6).....	21, 29
TEX. CIV. PRAC. & REM. CODE § 51.014(d).....	23, 29
TEX. R. APP. P. 25.1	27
TEX. R. APP. P. 25.1(c).....	27
TEX. R. APP. P. 26.1(b)	24
TEX. R. APP. P. 27.2.....	23
TEX. R. APP. P. 28.1(a).....	24
TEX. R. APP. P. 33.1(a)(2).....	13, 14, 16, 17
TEX. R. APP. P. 33.1(a)(2)(A)	11, 12
TEX. R. APP. P. 33.1(a)(2)(B).....	12
TEX. R. APP. P. 34.5(a).....	24
TEX. R. APP. P. 34.5(b), 34.6(a).....	24
TEX. R. APP. P. 34.5(c).....	24
TEX. R. APP. P. 35.1(b)	24
TEX. R. APP. P. 35.3(a)(2), (b)(2).....	24
TEX. R. APP. P. 38.1(i)	28
TEX. R. APP. P. 38.1(b)	27
TEX. R. APP. P. 38.1(f).....	26
TEX. R. APP. P. 38.9(b)	27
TEX. R. APP. P. 50(d).....	24
TEX. R. APP. P. 53.2(i)	28
TEX. R. APP. P. 53.2(b)	27
TEX. R. APP. P. 53.2(f)	26
TEX. R. APP. P. 55.2(i)	28
TEX. R. APP. P. 55.2(b).....	27
TEX. R. APP. P. 55.2(f)	26
TEX. R. CIV. P. 5	3, 4
TEX. R. CIV. P. 11	2, 4, 5, 14

TEX. R. CIV. P. 21	3
TEX. R. CIV. P. 21a.....	3, 4, 10
TEX. R. CIV. P. 41	23
TEX. R. CIV. P. 45(b).....	6
TEX. R. CIV. P. 47(a).....	6
TEX. R. CIV. P. 63	17
TEX. R. CIV. P. 93	16
TEX. R. CIV. P. 166	2, 17
TEX. R. CIV. P. 166a.....	7, 9
TEX. R. CIV. P. 166a(i).....	passim
TEX. R. CIV. P. 166a(i) Notes & comments	6
TEX. R. CIV. P. 166a(a), (b).....	5
TEX. R. CIV. P. 166a(c)	passim
TEX. R. CIV. P. 166a(c), (i)	5, 27
TEX. R. CIV. P. 166a(d)	8
TEX. R. CIV. P. 166a(f).....	8, 9, 10, 13
TEX. R. CIV. P. 166a(g).....	15, 25
TEX. R. CIV. P. 176.6(c).....	8
TEX. R. CIV. P. 193.6	13
TEX. R. CIV. P. 193.6(a).....	13
TEX. R. CIV. P. 193.6(b).....	13
TEX. R. CIV. P. 193.7	8
TEX. R. CIV. P. 251.....	15, 16
TEX. R. CIV. P. 252	14, 15, 16
TEX. R. EVID. 401	9
TEX. R. EVID. 402	9
TEX. R. EVID. 702	9
TEX. R. EVID. 802	9
TEX. R. EVID. 901(a).....	8, 16
TEX. R. EVID. 901(b).....	8, 9

TEXAS CONSTITUTION AND LEGISLATIVE MATERIALS

S.J. OF TEX., 81 st Leg., R.S. 558 (2009) (recording committee referral), <i>with subsequent history available online at</i> http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=SB1384	24
TEX. CONST. art. I, § 8	21, 28
Tex. S.B. 1384, 81 st Leg., R.S. (2009), available online at http://www.capitol.state.tx.us/tlodocs/81R/billtext/html/SB01384I.htm	24

OTHER AUTHORITIES

Craig T. Enoch, David Fowler Johnson, <i>Appealing Summary Judgments</i> at 19, State Bar of Texas Appellate Boot Camp (Sept. 3, 2008).....	4
George Crabbe, "Late Wisdom, <i>The Oxford Book of English Verse: 1250-1900</i> (ed. 1919)	1

Navigating the
Summary Judgment Maze

We've trod the maze of error round,
Long wandering in the winding glade;
And now the torch of truth is found,
It only shows us where we strayed . . .

*George Crabbe, "Late Wisdom,"
The Oxford Book of English Verse: 1250-1900
(ed. 1919)*

More than simply showing where one might have strayed into error in the past, this paper aims to illuminate for future use the paths through the summary judgment maze.

I. BEFORE GOING IN: PREPARING TO MOVE FOR SUMMARY JUDGMENT

Before tearing headlong into the maze, some early preparation is helpful.

- Review the pleadings. What claims or defenses have you pleaded? What claims or defenses has your opponent pleaded? Are there possible bases for summary judgment that would require you to amend your pleadings? If so, what other strategic considerations are at play, and how do they affect the timing of a motion for summary judgment?
- Review your deposition outlines. If you have not already taken depositions, or if you are in the midst of them, take a fresh look at your deposition outlines. Are there any areas of inquiry or specific questions that should be added in order to acquire summary judgment evidence on a particular ground or issue? Are there any adverse or third-party witnesses you may need to depose in order to obtain evidence in the proper form to attach to a summary judgment motion? (This is an equally useful process if you anticipate *responding* to a summary judgment motion further down the road.)
- Review your discovery requests and any document productions. Are there any interrogatories or requests for admissions whose responses might be useful in support of your anticipated summary judgment motion? Go ahead and get those drafted and served, to allow time to receive the responses and resolve any discovery disputes before your summary judgment motion must be filed. In terms of document productions, are there any gaps for which you believe a motion to compel is appropriate? Again, that process takes time, so plan ahead in order to (hopefully) obtain the needed documents in advance of filing

a traditional summary judgment motion. Also, as to any documents you've received that you believe would support summary judgment, are there any additional steps you need to take in order to authenticate, prove up, or otherwise render the documents admissible? This process may require a deposition on written questions to a business records custodian, a non-party affidavit, or even an oral deposition.

- Sketch out the jury charge. This may seem like overkill at an early stage of the case, but the jury charge will focus you on the crux of your case. What are the essential elements of each claim or defense? What aspects would be presented to a jury (*i.e.*, where are the potential fact issues)? When you read the questions and instructions (or the outline of same), what portions give you a headache? Not only will a roughed-out charge inform you as to summary judgment issues for research and gathering evidence, the charge will assist you in determining whether beefed-up pleadings are in order, and in deciding what questions need to be asked at depositions.

Taking a step back and viewing the pleadings and discovery process through the summary judgment lens will put you in good stead as the case progresses and you begin drafting summary judgment papers.

II. ENTERING THE MAZE: DEADLINES FOR FILING SUMMARY JUDGMENT PAPERS

In this section, we examine the various deadlines for filing and serving the summary judgment motion, response, reply, objections, and special exceptions. However, please note that the final subsection discusses, among other things, the effect of service by mail or facsimile on the basic deadlines (in terms of whether three days are added). Thus, as it turns out, wherever "21 days" is mentioned as the period applicable to filing and serving the summary judgment motion, that period actually may be "24 days" if you are filing or serving by mail, or serving by facsimile.

A. Notice Requirement for Motion

A summary judgment motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for the hearing or submission. *See* TEX. R. CIV. P. 166a(c). Accordingly, the nonmovant is entitled to 21 days' notice of the date initially set for the hearing or submission of a summary judgment motion. TEX. R. CIV. P. 166a(c); *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994). This notice requirement is strictly enforced. *Lewis*, 876 S.W.2d at 316. It applies to both types of summary judgment motions (*i.e.*, traditional and no evidence) in whatever posture (*e.g.*, cross-motion for summary judgment, motion for summary judgment on a counterclaim or defense). *See* TEX. R.

Civ. P. 166a(c); *Jones v. Illinois Employers Ins.*, 136 S.W.3d 728, 735 (Tex. App.—Texarkana 2004, no pet.) (holding that cross-motion for summary judgment filed with response seven days before hearing did not provide required 21 days’ notice).

The 21-day notice period applies if the movant amends or supplements its motion for summary judgment; another 21 days’ notice must be provided. *Sams v. N.L. Indus.*, 735 S.W.2d 486, 488 (Tex. App.—Houston [1st Dist.] 1987, no writ). However, the notice period does not apply to *resetting* a summary judgment hearing. *Birdwell v. Texins Credit Union*, 843 S.W.2d 246, 250 (Tex. App.—Texarkana 1992, no writ). Nor does the 21-day notice period apply to *reconsideration* of the trial court’s ruling on the summary judgment motion. *Winn v. Martin Homebuilders, Inc.*, 153 S.W.3d 553, 556 (Tex. App.—Amarillo 2004, pet. denied). Indeed, a court may grant a previously denied summary judgment motion that is still within its jurisdiction *sua sponte* and without any notice to the parties. *See Winn*, 153 S.W.3d at 556; *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 877 (Tex. App.—Corpus Christi 1996, writ denied). This principle is based on the notion that denial of a motion for summary judgment is an interlocutory ruling that the trial court has discretion to change or modify at any time until a final judgment is rendered. *Winn*, 153 S.W.3d at 556; *West*, 917 S.W.2d at 876-77.

B. Ultimate Deadline to File Motion

Thus, the ultimate deadline for filing a summary judgment is effectively 21 days before trial. This timing would allow the trial court to rule on the summary judgment motion on the first day of trial, before the venirepanel is assembled. However, this type of timing may not accomplish strategic goals, such as the narrowing of issues or the disposition of the case at a time when substantial trial preparation may be avoided.

In addition, a scheduling order or Rule 11 agreement may set earlier deadlines for filing a summary judgment motion. *See, e.g., Dallas County v. Rischon Dev. Corp.*, 242 S.W.3d 90, 93 (Tex. App.—Dallas 2007, pets. denied) (Rule 11 agreement); *Choucroun v. Sol L. Wisenberg Ins. Ag.-Life & Health Div., Inc.*, 2004 WL 2823147, at *1 (Tex. App.—Houston [1st Dist.] Dec. 9, 2004, no pet.) (mem. op.) (scheduling order). A deadline set by a scheduling order may be modified by the trial court for any or no reason, pursuant to the court’s inherent power to control its docket. *See Choucroun*, 2004 WL 2823147, at *1; *see also Wil-Roye Inv. Co. II v. Washington Mut. Bank*, 142 S.W.3d 393, 401-02 (Tex. App.—El Paso 2004, no pet.) (regarding inherent power to modify docket control orders generally); TEX. R. CIV. P. 166 (discussing scheduling orders). Therefore, a court acts

within its discretion in refusing to consider summary judgment papers that are not filed in accordance with deadlines in a scheduling order. *Cf. Esty v. Beal Bank S.S.B.*, --- S.W.3d ---, 2009 WL 2506338, at *9 (Tex. App.—Dallas Aug. 18, 2009, no pet. h.) (finding no abuse of discretion in striking expert affidavit filed after scheduling order deadline because such deadlines supplant the general rules); TEX. R. CIV. P. 166 (providing that a scheduling order shall control the subsequent course of the action). However, a Rule 11 agreement and deadlines contained therein are construed and enforced as a contract between the parties. *Rischon Dev.*, 242 S.W.3d at 93-94. Thus, courts should not consider papers that are not filed in accordance with deadlines in a Rule 11 agreement. *Cf. EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 92 (Tex. 1996) (stating principle in context of response to motion to compel arbitration filed untimely per parties’ Rule 11 agreement).

C. Deadline for Filing Response

The nonmovant’s response, including any supporting affidavits, must be filed and served “not later than seven days prior to the day of the hearing” or submission. TEX. R. CIV. P. 166a(c).

D. Deadline for Filing Reply

There is no deadline in the Texas Rules of Civil Procedure or in case law for the movant to file its reply. *Martin v. Estates of Russell Creek Homeowners Ass’n*, 251 S.W.3d 899, 903 n.2 (Tex. App.—Dallas 2008, no pet.); *Shelton v. Sargent*, 144 S.W.3d 113, 119 (Tex. App.—Fort Worth 2004, pets. denied), *cert. denied*, 549 U.S. 1281 (2007). However, local rules sometimes impose “advance” deadlines for filing summary judgment replies. *E.g.*, DALLAS (TEX.) CIV. DIST. CT. LOC. R. 2.09 (requiring that summary judgment replies be filed and served no less than three days before the hearing). If no local rule applies, the reply could be filed on the day of (but before) the summary judgment hearing.

E. Deadline for Filing Objections

The deadline for the nonmovant to file objections to the movant’s motion or evidence is the same as the deadline to file the summary judgment response, *i.e.*, not later than seven days prior to the hearing/submission date. *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006), *cert. denied*, 549 U.S. 1281 (2007). There is no deadline in the Texas Rules of Civil Procedure or in case law for the movant to file objections to the nonmovant’s response or evidence. *Martin*, 251 S.W.3d at 903 n.2; *Shelton*, 144 S.W.3d at 119. However, any local rules setting deadlines for the movant to file its reply (*see* Subsection D, *supra*) likely apply equally to the movant’s objections to the nonmovant’s response or evidence.

In addressing the timeliness of summary judgment objections, Texas courts of appeals have considered the nonmovant's objections as part of its response and the movant's objections as part of its reply. See *Martin*, 251 S.W.3d at 903 n.2 (discussing lack of deadline for movant to file "its reply (including objections)"); *Reynolds*, 188 S.W.3d at 259 (discussing deadline for nonmovant's "response" as "including any objections to the movant's evidence"); *Shelton*, 144 S.W.3d at 119 (discussing objections as part of reply). Courts have applied the same deadline, or lack of deadline, to both the response/reply and the corresponding party's objections. See *Martin*, 251 S.W.3d at 903 n.2; *Reynolds*, 188 S.W.3d at 259; *Shelton*, 144 S.W.3d at 119. Thus, where local rules set a deadline for filing the movant's reply, it is likely that the same deadline would be interpreted as applying to the movant's objections to the nonmovant's response/evidence. Cf. *Martin*, 251 S.W.3d at 903 n.2; *Shelton*, 144 S.W.3d at 119. Where no local rule applies, objections filed on the day of the hearing (before the hearing) are acceptable in terms of timing. *Reynolds*, 188 S.W.3d at 259.

F. Deadline for Filing Exceptions

An "exception" to a summary judgment motion or response is a complaint that the issues identified therein as supporting or defeating summary judgment are unclear or ambiguous. See *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993) (discussing exceptions as equally applicable to motions and responses); *Shelton*, 144 S.W.3d at 119 (defining exceptions in terms of responses). The deadline for the nonmovant to file exceptions to the motion is the same as the response deadline: not later than seven days before the hearing/submission date. *McConnell*, 858 S.W.2d at 343 n.7.

However, the deadline for the movant to file exceptions to the response is not the same as the reply deadline. The Texas Supreme Court has held that Texas Rule of Civil Procedure 21 requires the movant to file and serve any exceptions to the nonmovant's response not less than three days before the summary judgment hearing. *McConnell*, 858 S.W.2d at 343 n.7; see also *Shelton*, 144 S.W.3d at 119. As indicated above in Subsection E, this three-day period does not apply to filing or serving objections. *Reynolds*, 188 S.W.3d at 259; *Shelton*, 144 S.W.3d at 119.

G. Calculating Summary Judgment Deadlines

1. General Principles

Summary judgment deadlines are framed as so many days before or prior to the date of the summary judgment hearing or submission. E.g., TEX. R. CIV. P. 166a(c). In calculating these "advance" deadlines, the day of filing/service is not included, but the day set for hearing or submission is included. *Lewis*, 876 S.W.2d

at 315-16. Thus, the hearing on a motion for summary judgment may be set as early as the 21st day after the motion is served, or the 24th day if the motion is served by mail. *Lewis*, 876 S.W.2d at 316; see also Subsection G(2), *infra*. Likewise, the nonmovant's response may be filed on the seventh day before the hearing. *Wright v. Lewis*, 777 S.W.2d 520, 521-22 (Tex. App.—Corpus Christi 1989, writ denied); *Benger Builders, Inc. v. Business Credit Leasing, Inc.*, 764 S.W.2d 336, 338 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Volvo Petroleum, Inc. v. Getty Oil Co.*, 717 S.W.2d 134, 137-38 (Tex. App.—Houston [14th Dist.] 1986, no writ).

2. Effect of Filing or Service by Mail or Facsimile

Summary judgment papers may be filed and served by mail (or served by facsimile). See TEX. R. CIV. P. 5, 21a. Filing by mail under Rule 5 requires that the document be: (1) sent to the proper clerk; (2) by first-class United States mail; (3) in an envelope or wrapper; (4) properly addressed and stamped; (5) deposited in the mail on or before the last day for filing; and (6) received by the clerk not more than ten days after the last day for filing. TEX. R. CIV. P. 5. If the filing party follows the provisions of Rule 5, the summary judgment paper is considered timely filed on the day it is deposited in the mail, so long as the paper reaches the clerk no more than ten days after the deadline. See *id.*; see also *Geiselman v. Cramer Fin. Group*, 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Clendennen v. Williams*, 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ).

Tip: All of the requirements in the filing party's control (*i.e.*, items 1 through 5 in the list immediately above) are evidenced by the very package that the party is mailing to the clerk. In other words, once you accomplish your goal of depositing the properly prepared package in the mail on or before the deadline, you give away the only proof you have that you accomplished your goal.

A legible postmark affixed by the United States Postal Service is *prima facie* evidence of the date of mailing (TEX. R. CIV. P. 5), but rarely will a clerk retain the envelope in which the papers were sent. It is unclear whether a postmark constitutes *prima facie* evidence of mailing when affixed to the certified mail receipt for the package sent to the clerk. See *id.* (mentioning "affixed" without clearly defining to what the postmark must be affixed); *Lofton v. Allstate Ins. Co.*, 895 S.W.2d 693, 693 (Tex. 1995) (noting that, although "a" postmark is *prima facie* evidence of mailing, "no postmark" was

available). However, an affidavit establishing the elements of Rule 5 (other than receipt by the clerk) may be sufficient to establish that those elements were met.¹ *Lofton*, 895 S.W.2d at 693-94; *see also Flores v. Texas Prop. & Cas. Ins. Guar. Ass'n*, 167 S.W.3d 397, 400 (Tex. App.—San Antonio 2005, pet. denied) (providing example of affidavit addressing Rule 5 elements); *Arnold v. Shuck*, 24 S.W.3d 470, 472 (Tex. App.—Texarkana 2000, pet. denied) (clarifying that Rule 5 elements must be addressed). The affiant is not required to be an attorney. *Arnold*, 24 S.W.3d at 472; *Lydick v. Rachal*, 2002 WL 31193440, at *3 (Tex. App.—Dallas Oct. 3, 2002, no pet.) (not designated for publication). In addition, the authors of last year’s summary judgment presentation suggested that a party might include in the document being filed a “Certificate of Filing” that sets forth all facts necessary to establish the applicable Rule 5 requirements. Craig T. Enoch, David Fowler Johnson, *Appealing Summary Judgments* at 19, State Bar of Texas Appellate Boot Camp (Sept. 3, 2008).

Be aware that filing or service by mail or facsimile adds three days to the advance deadline to file a summary judgment motion. Such filing or service does not add three days to the advance deadline to file a response, or very likely, to the advance deadline in some local rules for filing a reply. The rationale for the distinction is that the seven-day deadline for filing and serving a response is intended to give the *nonmovant* at least 14 days to obtain and file summary judgment evidence, not to give the *movant* at least seven days to prepare for the hearing. *See Extended Servs. Program, Inc. v. First Extended Serv. Corp.*, 601 S.W.2d 469, 470 (Tex. App.—Dallas 1980, writ ref’d n.r.e.). Similarly, any local deadline for filing and serving a reply likely is intended to give the court time to review the papers in advance of the hearing, not to give the parties time to prepare for the

¹ In the context of Rule 21a – in which *prima facie* evidence of service is provided by a proper certificate of service, a return of an officer, or the affidavit of any person showing service – the live testimony of an attorney is not an equivalent that will establish proper service. *Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied); *Guinn v. Zarsky*, 893 S.W.2d 13, 17 (Tex. App.—Corpus Christi 1994, no writ). In the context of Rule 5 – in which case law suggests that an affidavit may provide the required evidence of filing by mail – it would be wise to strictly comply with the affidavit format, rather than relying on live testimony or some other form of evidence as an equivalent.

hearing. *Cf. Wright*, 777 S.W.2d at 522 (noting that primary purpose of filing reply objections is to call the court’s attention to improper evidence and procedure).

Accordingly, when a summary judgment motion and/or notice of the summary judgment hearing/submission date are filed by mail or served by mail or facsimile, three days are added to the 21-day advance notice period. TEX. R. CIV. P. 5, 21a, 166a(c); *Lewis*, 876 S.W.2d 315. Therefore, if the motion or notice is filed or served by mail, that paper must be deposited in the mail at least **24** days before the hearing/submission date. *See* TEX. R. CIV. P. 21a, 166a(c); *Lewis*, 876 S.W.2d 315. Or, if served by fax, the paper must be “served” **no later than 5:00 p.m. local time of the recipient** at least **24** days before the hearing/submission date. TEX. R. CIV. P. 21a, 166a(c); *Lewis*, 876 S.W.2d 315.

On the other hand, a response may be served by depositing it in the mail, in compliance with Texas Rule of Civil Procedure 5, seven days before the hearing/submission date. *Jones*, 136 S.W.3d at 735. In other words, the provisions of Rule 21a do not operate to add three days to the “not later than seven days prior” period when the response is served by mail. *See id.*

3. *Changing Deadlines by Rule 11 Agreement or Court Ruling*

As with the ultimate deadline for filing summary judgment motions (*see* Subsection B, *supra*), other summary judgment deadlines may be changed by Rule 11 agreement or by the trial court. *D.B. v. K.B.*, 176 S.W.3d 343, 347 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (reducing notice period for filing motion per Rule 11 agreement); *Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 377 & n.31 (Tex. App.—Fort Worth 2003, pet. denied) (changing deadline to file response through Rule 11 agreement); *Hall v. Stephenson*, 919 S.W.2d 454, 461 (Tex. App.—Fort Worth 1996, writ denied) (reducing notice period for filing motion by court order). In order for a court to reduce the 21-day notice period for filing and serving a motion, advance notice to the nonmovant’s counsel is required. *See* TEX. R. CIV. P. 166a(c) (providing for 21-day notice period “[e]xcept on leave of court, with notice to opposing counsel” (emphasis added)); *cf. Hall*, 919 S.W.2d at 461 (providing example of order providing advance notice). Moreover, a trial court’s discretion to reduce the 21-day notice period is not unbounded. *See Stephens v. Turtle Creek Apts., Ltd.*, 875 S.W.2d 25, 26-27 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding that one day’s advance notice and reduction of notice period to six days did not provide nonmovant sufficient notice of the summary judgment motion as required by Rule 166a(c)).

Tip: In order to be enforceable under Texas Rule of Civil Procedure 11, an agreement must be: (1) between attorneys or parties; (2) touching a suit that is pending; and (3) either (a) in writing, signed, and filed among the papers of the case, or (b) made in open court on the record. The writing requirement is satisfied by a document or series of documents that contain all essential elements of the agreement, without resorting to oral testimony. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995). The filing requirement is satisfied so long as the document is filed before it is to be enforced (e.g., even after the time for performance or the occurrence of a breach). *See id.* at 461. Thus, it is advisable to carefully draft – or revise as necessary a proposed – Rule 11 agreement to ensure that all essential elements are included. It also behooves the parties to file the Rule 11 agreement with the court from the outset, so that it is already on file if it becomes necessary to seek enforcement on an expedited basis. In a pinch, be aware that there are some exceptions to the strict application of Rule 11’s requirements. *See Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984).

other claims, or by way of or reference to summary judgment evidence. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *McConnell*, 858 S.W.2d at 341.

Tip: Never file a separate “brief” in support of a summary judgment motion; include all of your supporting arguments in the motion. *See McConnell*, 858 S.W.2d at 339-40. If you feel that the trial court may not wade through more than a page or two before reaching a preliminary decision, use a compelling and concise introduction, or a punchy bullet point list, to catch the trial court’s attention (not a separate motion). In addition, to the extent that some facts or arguments may overlap between several summary judgment grounds, be sure to incorporate by reference the portions of your fact statement or other sections of related argument. *Johnson*, 73 S.W.3d at 204.

Appellate courts cannot affirm a summary judgment based on a ground not presented to the trial court in the motion. *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

B. Traditional Summary Judgment

A “traditional” summary judgment motion seeks judgment as a matter of law. The motion may be made by the party seeking relief or the defending party. TEX. R. CIV. P. 166a(a), (b). Such a motion must be granted if the movant shows that, except as to the amount of damages, there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The movant may base its request on the evidence (i.e., by conclusively establishing all elements of the movant’s claims or defenses, or conclusively disproving at least one element of the nonmovant’s claims and defenses), on the law (i.e., by demonstrating that a controlling question of law is dispositive in the movant’s favor), or on the pleadings (i.e., by establishing that the nonmovant has no viable claim or defense based on the nonmovant’s pleadings). *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (regarding summary judgment based on evidence); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197, 199 (Tex. 1995) (regarding summary judgment based on dispositive legal question); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994) (regarding summary judgment based on pleadings).

The motion is required to state the specific grounds for summary judgment. TEX. R. CIV. P. 166a(c); *McConnell*, 858 S.W.2d at 341. The purpose of this requirement is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary

III. TURN ONE: DRAFTING THE MOTION, RESPONSE, AND REPLY

A. Grounds Stated in the Motion

A trial court cannot grant summary judgment – whether traditional or no evidence – on a ground not stated in the motion. TEX. R. CIV. P. 166a(c), (i); *McConnell*, 858 S.W.2d at 341. A ground may not be supplied by a prayer for general relief. *Golden Triangle Energy v. Wickes Lumber*, 725 S.W.2d 439, 441 (Tex. App.—Beaumont 1987, no writ); *cf. Ortiz v. Collins*, 203 S.W.3d 414, 425 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (explaining that no evidence motion cannot allege generally that there is no evidence to support the nonmovant’s claim or defense). A ground also may not be supplied through a separate brief in support,² by arguments addressed solely to

² On the other hand, if the motion (or response) itself states sufficiently specific grounds for summary judgment, a trial court certainly may consider a separately filed brief in reaching its summary judgment decision. *Golden Harvest Co. v. City of Dallas*, 942 S.W.2d 682, 692 (Tex. App.—Tyler 1997, writ denied). The brief should not state any additional “grounds” or additional argument regarding the grounds stated in the motion, but it can provide additional authority for the same grounds and arguments stated in the motion. *Id.*

judgment. *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978), *overruled in part on other grounds by City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (as recognized in *McConnell*, 858 S.W.2d at 342 n.5). The specificity requirement parallels the “fair notice” requirements for pleadings, particularly pleadings asserting a claim for relief. *See Alvarez*, 576 S.W.2d at 772; *see also* TEX. R. CIV. P. 45(b), 47(a). Thus, the grounds in the traditional motion are sufficiently specific if they provide “fair notice” to the nonmovant. *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 649 (Tex. App.—Fort Worth 2004, no pet.); *Thomas v. Cisneros*, 596 S.W.2d 313, 316 (Tex. App.—Austin 1980, writ ref’d n.r.e.); *see also Alvarez*, 576 S.W.2d at 772.

Pleadings give fair notice when an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the nature and the basic issues of the controversy and the testimony probably relevant. *Myan Management Group, L.L.C. v. Adam Sparks Family Revocable Trust*, --- S.W.3d ---, 2009 WL 1875602, *4 (Tex. App.—Dallas July 1, 2009, no pet. h.); *Coffey v. Johnson*, 142 S.W.3d 414, 417 (Tex. App.—Eastland 2004, no pet.); *City of Houston v. Howard*, 786 S.W.2d 391, 393 (Tex. App.—Houston [14th Dist.] 1990, writ denied). If the traditional motion contains a concise statement that provides to the movant fair notice of the claim involved, the summary judgment grounds are sufficiently specific. *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied); *Thomas*, 596 S.W.2d at 316.

That said, a motion does not provide fair notice of a summary judgment ground if it is based on a general reference to the summary judgment evidence. *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 81 (Tex. 1989); *Upchurch v. Albear*, 5 S.W.3d 274, 284-85 (Tex. App.—Amarillo 1999, pet. denied). A general reference to a voluminous record which does not direct the court or the parties to the evidence on which the movant relies is not sufficiently specific. *Rogers*, 772 S.W.2d at 81; *Upchurch*, 5 S.W.3d at 285. Nor does an argument made in connection with one claim or summary judgment ground, in itself, provide fair notice that the same argument applies to another claim or ground in the same motion. *See Johnson*, 73 S.W.3d at 204.

In addition to the foregoing requirements, a motion seeking final summary judgment should request that the trial court dispose of all issues and all parties in the case. *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276-77 (Tex. 1996). A good practice is to list all the pending claims or defenses, identify all the issues on which summary judgment is sought, and name all the parties currently in the suit. *See id.* However, you should triple-check to verify that you

have not inadvertently omitted any pending claim/defense, summary judgment issue, or party.

In addition, a motion seeking final judgment should clearly state the party’s intent that the trial court sign a final, appealable judgment. *See* Section XI, *infra*.

Finally, if the movant would be entitled to attorneys’ fees in connection with the summary judgment, the movant should include a request for attorneys’ fees in the motion. In a summary judgment proceeding, attorneys’ fees cannot be established by judicial notice under Texas Civil Practice and Remedies Code section 38.004, which expressly applies only when a case is tried on the merits. Thus, an affidavit and any supporting documents (such as billing statements) should be filed as evidence of the amount, necessity, and reasonableness of the fees. *See General Elec. Supply Co. v. Gulf Electroquip, Inc.*, 857 S.W.2d 591, 601 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *cf. InvestIN.com Corp. v. Europa Int’l, Ltd.*, --- S.W.3d ---, 2009 WL 2232225, at *9 (Tex. App.—Dallas July 28, 2009, no pet. h.).

C. No Evidence Summary Judgment

A “no evidence” summary judgment motion seeks judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The motion may be made only by the party defending against a claim or defense. *Id.* The motion should not be filed, and cannot be determined, until after an adequate time for discovery has passed. *See id.* A discovery period set by pretrial order should be an “adequate time” unless there is a showing to the contrary. TEX. R. CIV. P. 166a(i) Notes & comments. Conversely, a no evidence motion should not be filed before such a period has concluded. *Id.*

The motion is required to state not merely the claims or defenses at issue, but “the *elements* [of the claim or defense] as to which there is no evidence.” TEX. R. CIV. P. 166a(i) (emphasis added); *Bean v. Reynolds Realty Group, Inc.*, 192 S.W.3d 856, 859 (Tex. App.—Texarkana 2006, no pet.). The comments to the rule expressly state that the “motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent’s case.” TEX. R. CIV. P. 166a(i) Notes & comments.

Unique to the no evidence area is appellate courts’ willingness to construe purported no evidence motions as traditional motions – with the different and higher burden on the movant – on appeal. *See, e.g., Humphrey v. Pelican Isle Owners Ass’n*, 238 S.W.3d 811, 814 n.1 (Tex. App.—Waco 2007, no pet.); *Tello*

v. *Bank One, N.A.*, 218 S.W.3d 109, 113 n.5 (Tex. App.—Houston [14th Dist.] 2007, no pet.). This switcheroo generally happens when a no evidence motion is combined with a traditional motion in one document. Subsection D, below, discusses the issue and strategies to avoid the shift in standards on appeal.

D. Hybrid Motion for Summary Judgment

After the advent of no evidence summary judgment motions in Texas state courts, there was considerable debate among the courts of appeals as to whether a party could safely file a single motion that urged summary judgment grounds under both the traditional and no evidence standards. Compare *Torres v. City of Waco*, 51 S.W.3d 814, 822 (Tex. App.—Waco 2001) (resurrecting principle that dual motion attaching evidence would be treated solely as traditional motion), *disapproved in part by Binur v. Jacobo*, 135 S.W.3d 646 (Tex. 2004); *with Alashmawi v. IBP, Inc.*, 65 S.W.3d 162, 170-71 & n.7 (Tex. App.—Amarillo 2001, pets. denied) (noting better practice is to file separate motions); *and Jennings v. City of Dallas*, 138 S.W.3d 366, 370 n.3 (Tex. App.—Dallas 2001) (noting that dual motions are confusing and disfavored), *rev'd on other grounds*, 142 S.W.3d 310 (Tex. 2004). Five years ago, the Texas Supreme Court resolved the issue. In *Binur*, the Court determined that appellate courts cannot disregard no evidence grounds (*i.e.*, cannot review them under the traditional standard) on the basis that evidence is attached to a hybrid motion. 135 S.W.3d at 651. The Court did advise that:

[U]sing headings to clearly delineate the basis for summary judgment under subsection (a) or (b) from the basis for summary judgment under subsection (i) would be helpful to the bench and bar, but the rule does not require it.

Id. Accordingly, so long as a motion combining traditional and no evidence grounds clearly sets forth those different grounds and otherwise meets Rule 166a's requirements, it is sufficient. *Id.*; *see also Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277, 281 (Tex. App.—Houston [1st Dist.] 2004., no pet.) (providing example of purportedly hybrid motion that did not give fair notice that it included traditional grounds).

At least two Texas courts of appeals have persisted in their approach that, where a summary judgment motion does not unambiguously state that it is filed under rule 166a(i) and does not strictly comply with the requirements of that rule (*e.g.*, discuss the no evidence standard, attach no evidence in support), it will be construed as a traditional summary judgment motion on appeal. *Humphrey*, 238 S.W.3d at 814 n.1; *Tello*, 218 S.W.3d at 113 n.5. Nor is it at all clear that the Corpus Christi-Edinburg Court of Appeals has

abandoned this approach, which was enunciated in several opinions preceding *Binur*. *See Richard v. Reynolds Metal Co.*, 108 S.W.3d 908, 911 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.); *Michael v. Dyke*, 41 S.W.3d 746, 750 (Tex. App.—Corpus Christi-Edinburg 2001, no pet.). Thus, if you are filing a summary judgment motion in any of these courts, the better course may be to file separate motions for traditional and no evidence summary judgment. Alternatively, include in your hybrid motion an unambiguous statement as to the grounds that are filed under Rule 166a(i), the fact that any evidence attached is presented with regard only to the “traditional grounds” and no evidence is attached in support of the no evidence grounds, and discuss the no evidence grounds and arguments in separate sections that clearly discuss and apply the no evidence requirements and standards. Indeed, these practices are advisable in any court under the principles announced in *Binur*.

E. Grounds Stated in the Response

1. Traditional Summary Judgment

In response to a traditional summary judgment motion, the nonmovant's failure to state grounds in opposition – or to file a response entirely – cannot provide the sole basis for granting the summary judgment motion. *See McConnell*, 858 S.W.2d at 343. In the traditional summary judgment context, the movant bears the burden to establish its right to judgment as a matter of law. TEX. R. CIV. P. 166a(c). Accordingly, the nonmovant always may complain on appeal that the grounds expressly presented to the trial court by the movant's motion are legally insufficient to support the summary judgment. *Clear Creek*, 589 S.W.2d at 678. Other than legal insufficiency, however, the nonmovant is limited on appeal to the grounds expressly presented to the trial court in its response. *Id.* If no grounds were presented or no response was filed, then legal insufficiency will be the only available challenge. *See id.*

2. No Evidence Summary Judgment

Once a proper no evidence summary judgment motion is filed, the nonmovant has the burden of proof to defeat it. TEX. R. CIV. P. 166a(i). Thus, the response must set forth the grounds on which the nonmovant relies to satisfy its burden. *See id.* & Notes & comments. Yet, the nonmovant is not required to marshal its proof, and instead is required only to point out evidence that raises a fact issue on the challenged elements. *Id.* Notes & comments.

Texas courts of appeals are split on whether, as with a traditional summary judgment, the nonmovant may challenge the legal sufficiency of a no evidence motion without including such a challenge in the response (or elsewhere in the summary judgment

papers). *Compare In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.-) (abrogating earlier contrary opinions and joining Houston Fourteenth and San Antonio courts in holding that objection may be raised for the first time on appeal); and *Crocker v. Paulyne’s Nursing Home, Inc.*, 95 S.W.3d 416, 419-20 (Tex. App.—Dallas 2002, no pet.) (holding that legal insufficiency challenge may be raised for first time on appeal); and *Cuyler v. Minns*, 60 S.W.3d 209, 213-14 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (same); and *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied) (same); with *Williams v. Bank One*, 15 S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.) (holding that legal sufficiency objection must be raised in the trial court or is waived); and *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied) (same).

F. Grounds in the Reply

The movant is not permitted to add new summary judgment grounds in its reply. See *Killam*, 53 S.W.3d at 4; *Specialty Retailers v. Fuqua*, 29 S.W.3d 140, 148 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

IV. TURN TWO: ASSEMBLING THE EVIDENCE

In terms of the types and forms of evidence, the requirements apply equally to movants and nonmovants.

A. Pleadings

Although a movant may seek summary judgment on the pleadings (*Trinity River Auth.*, 889 S.W.2d at 261), the pleadings themselves generally are not summary judgment evidence. *Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). Similarly, factual allegations in a summary judgment motion or response are not evidence, even if the motion or response is verified. *Quanaim v. Frasco Restaurant & Catering*, 17 S.W.3d 30, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Barrow v. Jack’s Catfish Inn*, 641 S.W.2d 624, 625 (Tex. App.—Corpus Christi 1982, no writ). However, judicial admissions contained in a party’s pleadings may properly support summary judgment in favor of the adverse party. See *Lyons v. Lindsey Morden Claims Mgmt.*, 985 S.W.2d 86, 92 (Tex. App.—El Paso 1998, no pet.); TEX. R. CIV. P. 166a(c)(ii) (referencing “admissions”).

B. Form of Summary Judgment Evidence

Summary judgment evidence may consist of “deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response,” “admissions, affidavits, stipulations of the parties, and authenticated or certified public records . . .” TEX. R. CIV. P.

166a(c)(i) & (ii). To the extent that a party uses discovery products not previously on file with the clerk as summary judgment evidence, that party must file and serve on all parties: (1) copies of the material, appendices containing the material, or a notice containing specific references to the discovery or other instruments; and (2) a statement of intent to use the specified discovery as summary judgment proof. TEX. R. CIV. P. 166a(d). The filing and service must be done in accordance with the deadlines applicable to the corresponding motion or response, *i.e.*, the movant must file and serve such materials at least 21 days before the hearing, and the nonmovant must file and serve at least seven days before the hearing. *Id.*

Documents submitted as summary judgment proof must be sworn to or certified. TEX. R. CIV. P. 166a(f). Documents that are unauthenticated, unsworn, or unsupported by any affidavit cannot be considered as summary judgment evidence. *Llopa, Inc. v. Nagel*, 956 S.W.2d 82, 87 (Tex. App.—San Antonio 1997, pet. denied); *St. Paul Companies v. Chevron U.S.A., Inc.*, 798 S.W.2d 4, 5 (Tex. App.—Houston [1st Dist.] 1990, writ dismissed). Supporting and opposing affidavits must be made on personal knowledge. TEX. R. CIV. P. 166a(f). The affidavits further must show affirmatively that the affiant is competent to testify to the matters therein, and must set forth such facts as would be admissible in evidence. *Id.* However, it is not necessary to use separate affidavits to authenticate documentary evidence, or to use “magic words,” so long as the affiant has verified the accuracy of the documents. *Nagel*, 956 S.W.2d at 87.

Legal conclusions in affidavits have no probative force in the summary judgment context. *801 Nolana, Inc. v. RTC Mortgage Trust*, 944 S.W.2d 751, 754 (Tex. App.—Corpus Christi 1997, writ denied). Witness testimony comprised only of legal conclusions is legally insufficient to support summary judgment. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). Furthermore, unsupported conclusory statements of fact do not provide proper summary judgment proof. *Ryland Group v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996).

C. Authentication

Authentication is a requirement of admissibility. TEX. R. EVID. 901(a); see also *Nagel*, 956 S.W.2d 87 (providing that unauthenticated documents are not proper summary judgment evidence). A document is authenticated if:

- The document was produced in discovery and is being used against the producing party/nonparty (TEX. R. CIV. P. 176.6(c), 193.7);
- A sponsoring witness properly vouches for the document’s authenticity (TEX. R. EVID. 901(b)); or

- The document is self-authenticating (*Id.* 902).

D. Hearsay

Hearsay that does not fall within an exception provided by rule or statute is inadmissible and is not competent summary judgment evidence. *Southland Corp. v. Lewis*, 940 S.W.2d 83, 85 (Tex. 1997); *cf.* TEX. R. EVID. 802.

E. Interested Witness Affidavits (Including Experts)

Summary judgment may be based on the testimony of an interested witness if the evidence is: (1) uncontroverted; (2) clear, positive and direct; (3) otherwise credible; (4) free from contradictions and inconsistencies; and (5) could have been readily controverted. TEX. R. CIV. P. 166a(c). “Could have been readily controverted” does not mean simply that the testimony could have been easily and conveniently *rebutted*; rather, it means that testimony is of a nature that opposing evidence could have effectively *countered* it. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); *see also Trico Techs. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). If the credibility of the affiant (or deponent, in the case of a deposition transcript) is likely to be a dispositive factor in resolving the case, then despite this rule, summary judgment is inappropriate. *Casso*, 776 S.W.2d at 558.

For summary judgment purposes, a party’s expert witness is considered an interested witness on any subject matter on which the factfinder must be guided solely by expert testimony.³ TEX. R. CIV. P. 166a(c). As with all other forms of summary judgment evidence, expert testimony offered in a summary judgment proceeding must be admissible. *See* TEX. R. CIV. P. 166a(f); *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997). For an expert’s opinion to be admissible under Texas Rule of Evidence 702, the expert must be qualified on the specific issue before the court, and the expert’s opinion must be relevant and based on a reliable foundation. TEX. R. EVID. 702; *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556-58 (Tex. 1995). Rule 702’s fundamental requirements of reliability and relevance are applicable to all expert testimony, including such testimony offered in the summary judgment context. *Wyndham Int’l., Inc. v. Ace Am. Ins. Co.*, 186 S.W.3d 682, 685-86 (Tex. App.—Dallas 2006, no pet.). Evidence that is either irrelevant or unreliable is inadmissible. *Robinson*, 923 S.W.2d at 557.

Relevancy incorporates the traditional analysis of relevance under Texas Rules of Evidence 401 and 402.

Robinson, 923 S.W.2d at 556. Relevant testimony is “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* Evidence that has no relationship to the issues of the case, is not of assistance to the jury, and is therefore inadmissible. *Id.* A non-exclusive list of factors that a trial court may consider in determining the reliability of expert testimony includes: (1) the extent to which the expert’s opinion has been or can be tested; (2) the extent to which the opinion relies upon the subjective interpretation of the expert; (3) whether the expert’s opinion has been subject to peer review or publication; (4) the potential rate of error; (5) whether the expert’s opinion was based on a reliable foundation; (6) whether testing was conducted to exclude other possible causes; (7) whether the expert’s methodology was suspect; and (8) whether the expert’s research was conducted for litigation. *Wyndham Int’l.*, 186 S.W.3d at 685; *see also Robinson*, 923 S.W.2d at 558-59.

With regard to reliability, the trial court must evaluate the methods, analysis and principles relied upon by the expert in reaching an opinion. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725 (Tex. 1998). If the opinion testimony is based on unreliable foundational data, any opinion drawn from that data is likewise unreliable. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Even when the underlying data are sound, the expert’s opinion is unreliable if the expert draws conclusions from that data based on flawed methodology. *Id.*

Even when an expert is qualified and can offer relevant and reliable opinions, conclusory statements or legal conclusions by the expert are insufficient to support summary judgment. *Anderson*, 808 S.W.2d at 55. But, if an interested expert witness presents legally sufficient evidence in support of a traditional motion for summary judgment, the opposing party must produce other expert testimony to controvert the claims. *Id.* Lay testimony will be insufficient to refute the expert’s testimony. *Id.* Similarly, an unchallenged affidavit by the movant’s attorney, offering testimony about the amount, necessity, and reasonableness of attorneys’ fees, is sufficient to support a summary judgment on the fees. *General Elec.*, 857 S.W.2d at 601. But, if the nonmovant provides a controverting expert affidavit, challenging any aspect of the attorneys’ fees evidence, the trial court cannot award fees by summary judgment. *Id.* at 601-02.

If the expert witness bases his or her affidavit (or deposition) testimony on documents or other records, those materials should be attached to the affidavit or included with the rest of the summary judgment evidence. TEX. R. CIV. P. 166a(f); *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 444-45 (Tex. App.—El Paso 1994, writ denied).

³ The affidavit of an interested expert witness can support summary judgment if it meets the requirements of Rule 166a, even if that expert is a party to the suit. *Anderson*, 808 S.W.2d at 55.

F. Evidence Attached to a Hybrid Motion

It appears that evidence attached to a hybrid motion in support of the Rule 166a(c) grounds may fall within the scope of review with regard to whether the nonmovant satisfied its burden under Rule 166a(i). See Section X(B)(2), *infra*. Therefore, consideration should be paid to the evidence being attached to a hybrid motion and its possible impact – whether viewed alone or in conjunction with the nonmovant’s evidence – on the no evidence motion.

V. TWIST: DRAFTING THE NOTICE OF HEARING

The notice of hearing may be provided by fiat in the motion or by a document separate from the motion. If notice is provided in a document separate from the motion, at least two Texas courts of appeals have held that the notice must contain a certificate of service or otherwise comply with the requirements for proof of service found in Rule 21a. *Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied) (requiring certificate of service); *Guinn v. Zarsky*, 893 S.W.2d 13, 17 (Tex. App.—Corpus Christi 1994, no writ) (holding that, where there was no certificate of service, return of an officer, or affidavit of a person showing service of the notice, there was no *prima facie* evidence of service, which required conclusion that nonmovant did not receive the required notice).

At a minimum, notice of a summary judgment hearing must: (1) inform the nonmovant that the motion has, in fact, been set for hearing; and (2) state the date and time of the hearing. *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ).

VI. TWIST: OBJECTIONS, OBTAINING LEAVE FOR LATE FILINGS, EXCEPTIONS, AND MOTIONS FOR CONTINUANCE

A. Objections to Evidence

1. Objections to Defects in Evidence

Rule 166a(f) requires that supporting and opposing “shall set forth such facts as would be admissible in evidence . . .” TEX. R. CIV. P. 166a(f). There is no difference between the standards for evidence that would be admissible in a summary judgment proceeding and those applicable at a regular trial. *Longoria*, 938 S.W.2d at 30. The manner in which evidentiary objections must be made in order to preserve error depends on whether the defect at issue is “formal” or “substantive.” “Formal defects” exist when summary judgment evidence is competent but inadmissible. *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). For example, a hearsay objection attacks a formal defect. See *Harrell v. Patel*, 225 S.W.3d 1, 6 (Tex. App.—El

Paso 2005, pet. denied). “Substantive defects” exist when the summary judgment proof is not only inadmissible, but also incompetent.⁴ *Garcia v. National Eligibility Express, Inc.*, 4 S.W.3d 887, 890 (Tex. App.—Houston [1st Dist.] 1999, no pet.). For example, interrogatory answers used in favor of the answering party are not competent evidence. *Id.* Likewise, an objection that an affidavit states a legal conclusion is a challenge that the evidence is not competent. *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

In order to preserve an objection to “formal defects” in summary judgment evidence, the objecting party must: (1) present the trial court with a sufficiently specific objection in writing; (2) request a written ruling on the objection; and (3) object to any failure to rule on the objection. See *Clear Creek*, 589 S.W.2d at 677; *Hou-Tex, Inc.*, 26 S.W.3d at 112; *Mathis*, 982 S.W.2d at 59. At least two courts of appeals have held that any party asserting a formal defect on appeal – whether to challenge the trial court’s summary judgment ruling *or as a basis to affirm* – also must have made that objection in the trial court. *E.g.*, *Trusty v. Strayhorn*, 87 S.W.3d 756, 762-63 (Tex. App.—Texarkana 2002, no pet.); *Martin v. Durden*, 965 S.W.2d 562, 565 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

An affidavit should not be excluded in its entirety if it is only partially inadmissible. See *Spradlin v. State*, 100 S.W.3d 372, 381 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Therefore, in order to be “sufficiently specific,” an objection should identify the specific objectionable portions or statements in each affidavit and state the basis for the objection(s). *Cf. Haynes v. Haynes*, 178 S.W.3d 350, 355 n.8 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (disapproving of objections that referred globally to five entire paragraphs of an affidavit and merely asserted in a conclusory manner that the testimony in those paragraphs is hearsay and fails to lay a proper predicate).

Theoretically, when a defect in summary judgment evidence is “substantive,” an objection cannot be waived and may be raised for the first time on appeal. *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied); *Garcia*, 4 S.W.3d at 890; *Mathis*, 982 S.W.2d at 60. However, there is confusion and debate in the courts of appeals over the nuances between “formal” and “substantive”

⁴ Despite the use of the word “incompetent” to describe evidence that is considered substantively defective, an objection that a witness is incompetent actually attacks a formal defect and must be asserted in the trial court or else is waived. See *Rizkallah v. Conner*, 952 S.W.2d 580, 585 (Tex. App.—Houston [1st Dist.] 1997, no writ).

defects. *Mathis*, 982 S.W.2d at 59. Therefore, the best course is to present to the trial court in writing all objections to summary judgment evidence.

2. Requirement to Obtain Ruling on Objections

When a party is required to obtain a ruling on evidentiary objections to preserve error, two questions arise: (1) must the ruling be in writing, or can it be an oral ruling reflected in the record; and (2) must the ruling be express, or can it be implied from the court's ruling on the summary judgment motion?

Historically, error was not preserved as to evidentiary objections to formal defects without an express, written order. *Frazier v. Yu*, 987 S.W.2d 607, 609 (Tex. App.—Fort Worth 1999, pet. denied); see also, e.g., *Utilities Pipeline Co. v. American Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ). However, the applicable appellate rule was later amended to allow error preservation based on a trial court ruling that is either express or implied. See *Frazier*, 987 S.W.2d at 609-10; TEX. R. APP. P. 33.1(a)(2)(A). Thus, if the trial court orally announces an express ruling that appears in the record, a written order should not be necessary to preserve that error. See *Columbia Rio Grande Regional Hosp. v. Stover*, 17 S.W.3d 387, 395-96 (Tex. App.—Corpus Christi 2000, no pet.); cf. *Allen v. Albin*, 97 S.W.3d 655, 661-62 (Tex. App.—Waco 2002, no pet.) (examining reporter's record of summary judgment hearing to determine whether court orally ruled on summary judgment objections).

Tip: Because no evidence may be presented at a summary judgment hearing, a trial court generally will not have a court reporter present. This means that there will be no record of the court's statements during the hearing. If you have filed objections to summary judgment evidence (or any other type of objections), consider calling the trial court coordinator, clerk, or reporter in advance to find out the court's amenability to having the reporter attend and record the hearing. Or, consider making a request to the trial court – in writing, served on opposing counsel – for a court reporter based on the fact that, in addition to the summary judgment motion, objections have been set for hearing. The chances of success may be low, but the possible benefit is enormous.

With regard to implied rulings, most Texas courts of appeals hold that, in general, a ruling on an evidentiary objection cannot be implied from the grant of a summary judgment motion. *Mead v. RLMC, Inc.*, 225 S.W.3d 710, 714 (Tex. App.—Fort Worth 2007, pet. denied) (determining that the mere fact that the trial court granted summary judgment does not imply

ruling on objections); *Delfino v. Perry Homes*, 223 S.W.3d 32, 34-35 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Palacio v. AON Properties, Inc.*, 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, no pet.); *In re Estate of Loveless*, 64 S.W.3d 564, 573 (Tex. App.—Texarkana 2001, no pet.); *Jones v. Ray Ins. Ag.*, 59 S.W.3d 739, 752-53 (Tex. App.—Corpus Christi-Edinburg 2001), pet. denied per curiam, 92 S.W.3d 530 (2002); *Chapman Children's Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 436 n. 4 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.); cf. *Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P.*, 114 S.W.3d 48, 51 (Tex. App.—Eastland 2003, no pet.) (refusing to imply ruling on objections from statement that trial court considered “competent” evidence, and stating principle that, absent a clear indication that the trial court actually excluded an item of summary judgment evidence, its inclusion in the record should be presumed).

Initially, the Fort Worth Court of Appeals had determined that an order granting summary judgment implicitly overruled the non-movant's objections to the movant's evidence. *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.); see also *Frazier*, 987 S.W.2d at 610. However, most courts disagreed with this principle and instead embraced the approach set forth by the San Antonio Court of Appeals in *Stafford*:

[R]ulings on a motion for summary judgment and objections to summary judgment evidence are not alternatives; nor are they concomitants. Neither implies a ruling-or any particular ruling-on the other. In short, a trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment; a ruling on the objection is simply not “capable of being understood” from the ruling on the motion for summary judgment

32 S.W.3d at 317. Even the Fort Worth Court of Appeals has backtracked from its initial approach, and has clarified that, in general, the mere grant of a summary judgment motion does not imply any particular ruling on the non-movant's objections. *Mead*, 225 S.W.3d at 714.

It is possible that specific circumstances in a particular case could support an implied ruling on an evidentiary objection. See TEX. R. APP. P. 33.1(a)(2)(A); *Mead*, 225 S.W.3d at 714 (distinguishing *Frazier*, 987 S.W.2d at 610, which found implied ruling on objections where affidavits were specifically and extensively objected to, trial

court was aware of objections, and trial court stated in order granting summary judgment that it had considered all “competent” evidence)⁵; *Jones*, 59 S.W.3d at 753 (stating that, for there to be an “implicit” ruling as intended by Rule 33.1(a)(2)(A), something in the summary judgment order or record, other than the mere granting of the summary judgment, must indicate the trial court ruled on objections). The Texarkana Court of Appeals has stated that a ruling on summary judgment objections may be implied if: (1) the record affirmatively indicates that the trial court ruled on the objections to the summary judgment proof in granting summary judgment; or (2) the summary judgment grounds and the summary judgment objections are of such a nature that the granting of summary judgment necessarily implies a ruling on the objections. *Trusty*, 87 S.W.3d at 760. For example, in *Blum*, where the appellee advanced a single ground for summary judgment and the appellant lodged a single objection to the appellee's expert's affidavit, which was her only summary judgment proof, it might be said that the overruling of the objection is implied in the granting of summary judgment. *Id.* (citing *Blum*, 977 S.W.2d at 822-23). However, the majority – if not now unanimous – view of Texas courts of appeals is that the grant of a summary judgment motion, in itself, does not imply any particular ruling on summary judgment objections. Therefore, a practitioner should not rely on the “implied ruling” option in Rule 33.1(a)(2)(A) in order to preserve error with regard to summary judgment evidentiary objections. This situation elevates the importance of objecting to the trial court's refusal to rule on objections. See TEX. R. APP. P. 33.1(a)(2)(B); *Clear Creek*, 589 S.W.2d at 677.

3. Requirement to Obtain Ruling on Objections Before the Summary Judgment Ruling

Traditionally, an order on summary judgment objections has not preserved error unless it was signed before the order on the summary judgment motion. *E.g.*, *Choctaw Properties, L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.). However, at least one Texas court of appeals has held that an order on objections, signed within the trial court's plenary period, can preserve error even if signed after the summary judgment order. *Crocker*, 95 S.W.3d at 421; *cf. Dolcefino v. Randolph*, 19 S.W.3d 906, 926 & n.15 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (stating that objections may be ruled on “at, before, or very near the time the trial court rules on the motion for summary judgment,” and noting that the court of appeals presumes that a trial judge has ruled on objections prior to ruling on the summary judgment motion, unless there is an express statement

that the trial judge has refused to rule on the objections).

If the ruling on objections is set forth in the summary judgment itself, it is a simple matter to make clear that the court is ruling on the objections prior to ruling on the summary judgment motion. *E.g.*, *Keeton v. Carrasco*, 53 S.W.3d 13, 23 (Tex. App.—San Antonio 2001, pet. denied) (stating in summary judgment order that objections to the summary judgment evidence “are sustained prior to proceeding with the merits of the motion for summary judgment and severance”). However, if the court indicates a desire to sign a separate order overruling your objections, it would be advisable for: (1) the order overruling objections to indicate that it is signed before the order on the summary judgment motion; and (2) the order granting the summary judgment motion to indicate that it is signed after the order overruling objections. Also, remember that many proposed summary judgments recite generally that the trial court is deciding the issues “[h]aving considered the motion for summary judgment, the response, the reply, the summary judgment evidence, and the arguments of counsel” If you have objected to summary judgment evidence, and particularly if the trial court has declined to expressly rule on your objections, consider the impact of this statement on your position.

Tip: When a party asserting objections is required to obtain a ruling in order to preserve error, the problem of invited error arises. Sometimes – whether to ensure that error is preserved or simply to advance the ball – it would be useful for the losing party to submit its own proposed order or judgment, overruling its objections or denying its requested relief. Other times, the court demands that both parties submit competing forms in accordance with its announced rulings. Yet, the invited error doctrine prohibits a party from complaining about error that he or she invited. *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet.); *Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 804 (Tex. App.—Houston [14th Dist.] 1996, writ denied). For example, a party cannot urge the trial court to enter a judgment on the jury's verdict and then complain about the jury's verdict on appeal. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984).

How, if at all, can a non-prevailing party submit a proposed order in conformity with the trial court's oral adverse ruling? The Texas Supreme Court has stated that “[t]here must be a method by which a party who

⁵ But see *Sunshine Mining*, 114 S.W.3d at 51 (refusing to imply ruling on objections where trial court stated that it had considered “competent” evidence).

desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms.” *First Nat’l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989). This method is to solidly reserve the right to complain. *Id.* There are two recognized methods: (1) make an express statement on the record when submitting your proposed order/judgment; or (2) sign the proposed order/judgment as “Agreed as to form only.” *See id.*; *Morse*, 975 S.W.2d at 381.

What sort of express statement on the record will do? In *Fotjik*, the Texas Supreme Court determined that the right to complain had been preserved when the non-prevailing party filed a motion for judgment that stated:

“While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result.”

775 S.W.2d at 633.

4. *Objections to Expert Testimony*

Expert testimony may be used as summary judgment evidence by affidavit or deposition. *See* TEX. R. CIV. P. 166a(c). However, as with all other forms of summary judgment evidence, the expert testimony must be admissible. *See* Section IV(E), *supra*.

One aspect of admissibility not addressed above in the discussion about expert affidavits is whether the expert must have been timely and properly disclosed as a testifying expert in order to provide summary judgment evidence. This issue has been unsettled for several years, but the Texas Supreme Court recently held that Texas Rule of Civil Procedure 193.6, which provides for exclusion of evidence on the basis of untimely discovery responses, does apply to summary judgment proceedings. *Fort Brown Villas III Condominium Ass’n v. Gillenwater*, 285 S.W.3d 879, 880-81 (Tex. 2009).

Under Rule 193.6, discovery that is not timely disclosed and witnesses that are not timely identified are inadmissible as evidence. TEX. R. CIV. P. 193.6(a); *Gillenwater*, 285 S.W.3d at 881. Thus, expert testimony offered as summary judgment evidence is inadmissible if the expert has not been timely and properly disclosed. *See* TEX. R. CIV. P. 193.6(a); *Gillenwater*, 285 S.W.3d at 881. A party who fails to

timely designate an expert has the burden of establishing good cause or a lack of unfair surprise or prejudice before the trial court may admit the evidence. TEX. R. CIV. P. 193.6(b); *Gillenwater*, 285 S.W.3d at 881.

A ruling on objections to expert testimony is not implied by the mere grant of summary judgment. *Torres v. GSC Enters., Inc.*, 242 S.W.3d 553, 560 (Tex. App.—Waco 2007, no pet.). Thus, such objections are waived unless there is an express ruling, something other than the grant of summary judgment indicates that the trial court impliedly ruled, or the objecting party further objected to the trial court’s refusal to rule. *Torres*, 242 S.W.2d at 560; TEX. R. APP. P. 33.1(a)(2).

5. *Objections to Late-Filed Evidence, and Obtaining Leave*

Summary judgment evidence may be filed late, but only with leave of court. TEX. R. CIV. P. 166a(c); *Crowder*, 919 S.W.2d at 663. Regardless of which party is late-filing the evidence or in what manner (*i.e.*, in an amendment or a response), if there is no indication in the record that the trial court granted leave, the appellate courts will presume that the trial court did not consider the evidence. *Crowder*, 919 S.W.2d at 663; *Mathis v. RKL Design/Build*, 189 S.W.3d 839, 842-43 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A ruling granting or denying leave may be stated in the record, set forth in a separate order, or included in the summary judgment order itself. *See Crowder*, 919 S.W.2d at 663 (referring to lack of any order granting leave to file evidence late); *Stephens v. Dolcefino*, 126 S.W.3d 120, 134 (Tex. App.—Houston [1st Dist.] 2003) (determining that oral ruling on the record accepting the late-filed evidence into the summary judgment record was sufficient), *pet. denied*, 181 S.W.3d 741 (2005); *cf. Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ) (involving summary judgment order stating that party was allowed to supplement the evidence, which occurred less than 21 days before hearing).

6. *Right to Opportunity to Correct Evidentiary Defects*

A party offering summary judgment evidence that is defective in form (as opposed to a substantive defect), as pointed out by the opposing party, should have the opportunity to file amended evidence that corrects the defects. TEX. R. CIV. P. 166a(f); *Tri-Steel Structures, Inc. v. Baptist Found.*, 166 S.W.3d 443, 448 (Tex. App.—Fort Worth 2005, *pet. denied*); *Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ).

If objections to summary judgment evidence are sustained but the trial court does not afford an

opportunity to file amended evidence, the offering party generally must request a continuance in order to preserve error. *Tri-Steel*, 166 S.W.3d at 448; *Webster*, 833 S.W.2d at 750. If the continuance is needed because the offering party will need additional discovery to correct the defect, the motion for continuance must meet the requirements of Texas Rule of Civil Procedure 252. *Tri-Steel*, 166 S.W.3d at 448. These requirements are discussed in detail below in Subsection C(2). Alternatively, if no additional discovery is needed in order to correct the defect, the request for continuance is not required to comply with the requirements for a Rule 252 motion. *Tri-Steel*, 166 S.W.3d at 448; *see also, e.g., Garcia v. Willman*, 4 S.W.3d 307, 311 (Tex. App.—Corpus Christi 1999, no pet.) (determining that trial court erred by not affording opportunity to amend when, at the hearing, the offering party requested the court’s permission for “leave or continuance”).

If the trial court grants an opportunity to amend, it would be wise to ask the court to expressly state the deadline for filing and serving the amended evidence. It is unclear whether the original deadlines for filing evidence under Rule 166a(c) apply equally to the filing of evidence when a summary judgment hearing is continued to afford the opportunity to amend. *See Peerenboom v. HSP Foods, Inc.*, 910 S.W.2d 156, 160 (Tex. App.—Waco 1995, no writ) (involving dispute over whether amended responsive evidence filed by nonmovant on day of continued hearing could be considered in light of seven-day advance notice provision in Rule 166a(c)). If the court does not provide direction and the parties do not reach a Rule 11 agreement, the offering party should attempt to comply with the same advance deadline as originally applied. If that timeline is not possible, the offering party may decide to include with its amended evidence an alternative motion for leave to shorten the time period.

As with other requested continuances in the summary judgment context (*see* Subsection C(2), *infra*), it is unclear whether the trial court’s proceeding with the hearing or granting a summary judgment impliedly overrules a request for continuance to allow amendment of summary judgment evidence. Therefore, the safest course is to seek an express ruling, and if unsuccessful, object to the trial court’s refusal to provide such a ruling. *Cf. TEX. R. APP. P. 33.1(a)(2)*.

B. Objections to Late-Filed or Late-Served Motions or Responses, and Obtaining Leave

A nonmovant’s failure to object to late notice of a motion for summary judgment waives the error. *Ajibade v. Edinburg Gen’l Hosp.*, 22 S.W.3d 37, 40 (Tex. App.—Corpus Christi-Edinburg 2000, pet. stricken) (stating principle and collecting cases). An objection raised as late as the motion for new trial

stage has been held to preserve error. *Nickerson v. E.I.L. Instruments, Inc.*, 817 S.W.2d 834, 835-36 (Tex. App.—Houston [1st Dist.] 1991, no writ). If the record does not establish even a *prima facie* showing of timely service, the nonmovant is not required to present any evidence. *See Guinn*, 893 S.W.2d at 17 (finding no minimum notice where nonmovant contended he did not receive it and record did not contain *prima facie* evidence or other evidence sufficient to establish actual service). However, if the record includes *prima facie* evidence of timely service (*e.g.*, a proper certificate of service), then the burden shifts to the nonmovant to rebut the presumption with competent and sufficient evidence. *Roob v. Von Bereghasy*, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied). To the extent that such evidence is presented at a hearing on the objections, the nonmovant must ensure that a reporter’s record of that hearing is included in the appellate record. *See id.*

On the other hand, if the nonmovant files a late response (including evidence, objections, and exceptions), it must obtain written leave or else the response is not before the court. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985). No objection is necessary to preserve this issue. In order to obtain leave for the untimely response, the nonmovant must show: (1) good cause, and (2) no undue prejudice. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005). Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference. *Id.* Undue prejudice depends on whether filing a late response will delay the summary judgment hearing or significantly hamper the opposing party’s ability to prepare for it. *Id.* at 443. If the record does not contain some indication that the trial court granted leave to file a late response, it is presumed that the trial court did not consider the untimely response, and the issues raised and grounds presented in the response are waived. *Goswami v. Metropolitan Savs. & Loan Ass’n*, 751 S.W.2d 487, 490 n.1 (Tex. 1988); *Bryant*, 686 S.W.2d at 615. The same principles apply to amended responses filed after the seven-day advance deadline.

Although untimely *filing* of a summary judgment response raises this presumption that the trial court did not consider the response, untimely *service* of a timely filed response may not create any such presumption. *See* Section XII(B)(3), *infra*. Therefore, a movant challenging an untimely *served* summary judgment response should object and obtain a timely ruling on that issue, rather than relying on a presumption that likely has not been triggered.

C. Objections to Premature No Evidence Motion, and Requests for Continuance for Additional Discovery

If a no evidence motion is filed before an “adequate time” for discovery and the nonmovant wants to challenge the timing, the nonmovant must object in the trial court. In order to properly object and preserve error, the nonmovant must lodge this objection in one of two ways: (1) file an affidavit setting forth the need for additional discovery; or (2) file a verified motion for continuance. *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *see also* TEX. R. CIV. P. 166a(g).

There seems to be a blurring of the requirements applicable to: (1) an objection that an adequate time for discovery has not passed; and (2) an objection that additional discovery is needed to respond to the summary judgment motion. However, the two objections do appear to be distinct.

1. Objection Based on Inadequate Time For Discovery

The “adequate time” requirement is set forth in Rule 166a(i). Whether a nonmovant has had an adequate time for discovery is case specific. *Johnson*, 167 S.W.3d at 467; *Restaurant Teams Int’l, Inc. v. MG Sec’ys Corp.*, 95 S.W.3d 336, 339 (Tex. App.—Dallas 2002, no pet.). To determine whether an adequate time for discovery has passed, courts should examine factors such as:

- (1) the nature of the case;
- (2) the nature of evidence necessary to controvert the no-evidence motion;
- (3) the length of time the case was active;
- (4) the amount of time the no-evidence motion was on file;
- (5) whether the movant had requested stricter deadlines for discovery;
- (6) the amount of discovery that had already taken place; and
- (7) whether the discovery deadlines in place were specific or vague.

Johnson, 167 S.W.3d at 467; *Restaurant Teams*, 95 S.W.3d at 339; *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591 (Tex. App.—San Antonio 2001, pet. denied).

2. Objection Based on Need for Additional Discovery

On the other hand, the option for a continuance based on a need for additional discovery is set forth in Rule 166a(g). In determining whether a continuance should be granted, courts examine:

- (1) the length of time the case has been on file;
- (2) the materiality of the discovery sought; and

- (3) whether due diligence was exercised in obtaining the discovery.

Johnson, 167 S.W.3d at 468; *Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 508 (Tex. App.—Houston [1st Dist.] 1994, no writ). To establish these elements, the supporting affidavit or motion must satisfy the requirements of Texas Rules of Civil Procedure 166a(g), 251, and 252. *See Rocha v. Faltys*, 69 S.W.3d 315, 319 (Tex. App.—Austin 2002, no pet.). Accordingly, the affidavit – whether filed alone or as necessary support for the verified motion for continuance – must describe the evidence sought, explain its materiality, and show that the party requesting the continuance has used due diligence to obtain the evidence. *Rocha*, 69 S.W.3d at 319; *see also Levinthal*, 902 S.W.2d at 508. Conclusory allegations are not sufficient. *Lee v. Haynes & Boone, L.L.P.*, 129 S.W.3d 192, 198 (Tex. App.—Dallas 2004, pet. denied); *Carter v. MacFadyen*, 93 S.W.3d 307, 310 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

With regard to materiality, the affidavit or motion must identify the discovery sought and link that discovery with the challenged element(s). For example, the affidavit or motion must identify: (1) the specific discovery needed; (2) the person from whom the discovery is sought; and (3) the type of information sought. *Gabalton v. General Motors Corp.*, 876 S.W.2d 367, 370 (Tex. App.—El Paso 1993, no writ); *see also Rocha*, 69 S.W.3d at 319. It is advisable to attach to the affidavit or motion outstanding discovery requests or deposition notices as exhibits. *Cf. Gabalton*, 876 S.W.2d at 370; *but see Verkin v. Southwest Ctr. One, Ltd.*, 784 S.W.2d 92, 96 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (noting that parties are not *required* to attach discovery requests).

Furthermore, the affidavit or motion must establish that the additional evidence is needed in order to decide one or more issues presented in the summary judgment motion. *See National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995). Thus, the nonmovant must provide detail explaining how the additional discovery is material to one or more challenged elements. *Cf. J.E.M. v. Fidelity & Cas. Co.*, 928 S.W.2d 668, 676 (Tex. App.—Houston [1st Dist.] 1996, no writ). The nonmovant also should establish how it will be prejudiced if not allowed to obtain the additional evidence. *See Garza v. Serrato*, 699 S.W.2d 275, 281 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).

Finally, establishing due diligence is essential. *Rocha*, 69 S.W.3d at 319. Conclusory allegations of diligence are insufficient. *Id.*; *see also Gregg v. Cecil*, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ). In demonstrating diligence, the affidavit or motion should describe: (1) the nonmovant’s attempts

to secure the discovery; and (2) the reasons the attempts were unsuccessful. *See* TEX. R. CIV. P. 252; *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 909 (Tex. App.—Beaumont 2000, pet. denied).

If a motion for continuance is used to assert an objection based on a need for additional discovery, all factual assertions in the motion must be supported by affidavit. TEX. R. CIV. P. 251; *see also Rhima v. White*, 829 S.W.2d 909, 912 (Tex. App.—Fort Worth 1992, writ denied). In addition, any and all other attachments to the motion should be verified by affidavit. *See, e.g.*, TEX. R. EVID. 901(a).

3. Necessity of Ruling or Objection to Refusal to Rule

It is unclear whether the trial court's moving forward with the hearing, in itself, implies that the objection or motion for continuance was overruled or denied. *Compare Williams*, 15 S.W.3d at 114-15 (where motion for continuance was filed two days before hearing, judgment recited that hearing was held, and record did not reflect the withdrawal of the motion, the trial court's grant of summary judgment implicitly overruled the motion for continuance); *with Casey v. Interstate Building Maintenance, Inc.*, 2000 WL 422901, at *2 (Tex. App.—Austin Apr. 10, 2000, no pet.) (not designated for publication) (where nonmovant did not obtain ruling on motion for continuance and did not object to the trial court's refusal to rule, any error in ruling on motion was waived). Consequently, the safest practice is to either obtain an *express* ruling or object to the trial court's refusal to expressly rule.

4. Objection Based on "Outstanding Discovery Issues"

It is unlikely that "outstanding discovery issues," in themselves, justify a continuance or denial of a summary judgment motion. Indeed, if the pending discovery dispute concerns discovery that a nonmovant lacks and needs in order to respond, it behooves the nonmovant to promptly bring that dispute before the trial court. Indeed, by the time the summary judgment motion or response is on file, it may be too late to avoid a conclusion that the nonmovant lacked diligence in moving that dispute to a resolution. *See, e.g., Anderson v. TU Elec.*, 2000 WL 567045, at *3 (Tex. App.—Dallas May 3, 2000, no pet.) (not designated for publication); *Casey*, 2000 WL 422901, at *3. To address this situation, the nonmovant should file a motion to compel and seek a hearing and ruling prior to the summary judgment hearing. *Cf. Anderson*, 2000 WL 567045, at *3; *Casey*, 2000 WL 422901, at *3.

D. Objection to No Evidence Motion by Party Bearing Burden of Proof on Claim or Defense

A party may move for no evidence summary judgment only as to a claim or defense for which the

burden of proof at trial would rest on the *adverse party*. TEX. R. CIV. P. 166a(i). If the party bearing the burden of proof moves for no evidence summary judgment on its own claim or defense, it is unclear whether this defect renders the motion legally insufficient (such that no objection is required) or whether an objection is required. *Compare Hermann v. Lindsey*, 136 S.W.3d 286, 290 (Tex. App.—San Antonio 2003, no pet.) (requiring objection to preserve error); *Keszler v. Memorial Med. Ctr.*, 105 S.W.3d 122, 125 (Tex. App.—Corpus Christi 2003, no pet.) (holding that a no-evidence motion for summary judgment is fundamentally flawed when used against an adverse party who would not have the burden of proof at trial on the element or issue raised). Thus, as always, the safest course is to timely object in writing and either obtain an express ruling or object to the trial court's refusal to make such a ruling. *Cf.* TEX. R. APP. P. 33.1(a)(2).

Even if an objection is required and waived, you may have an argument that the proper standard of trial court decision and appellate review is the standard applicable to *traditional* summary judgment motions. *See Hermann*, 136 S.W.3d at 290 (determining that failure to object waived error, but stating that, because the trial court and nonmovant treated motion as traditional, it would be reviewed on appeal under that standard); *Quanim*, 17 S.W.3d at 41 (determining that, summary judgment motion "purporting" to be filed under Rule 166a(i) "was actually a traditional motion for summary judgment" because it was based on affirmative defenses on which the movant bore the burden of proof). So, where the objection has been waived, you may not be able to make an argument that the no evidence motion is a nullity, but you may be able to obtain a trial court ruling and appellate court review as if the motion had been brought under the traditional standard.

E. Objection to Unpleaded and/or Unverified Affirmative Defense

In order to rely on an affirmative defense to secure or defeat a summary judgment, the party relying on the defense is required to specifically plead it and, when the defense is based on a claim enumerated in Texas Rule of Civil Procedure 93, to verify the pleading by affidavit. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991). However, an unpleaded affirmative defense also may serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a proper pleading either in response or before the rendition of judgment. *Id.* Thus, in order to preserve this challenge, the opposing party should object to the lack of a proper pleading (*i.e.*, the complete absence of any pleading and/or the failure to verify the pleading, if required). In addition,

because this objection can be waived, the opposing party should err on the side of caution and either obtain an express ruling or object to the trial court's refusal to provide one. *See* TEX. R. APP. P. 33.1(a)(2).

F. Exceptions

As indicated above (*see* Section II(F), *supra*), a party who wishes to complain about the manner in which summary judgment grounds are set forth in (or omitted from) a motion or response may have to specially except in order to preserve the complaint. In *McConnell*, the Texas Supreme Court made clear that a party must specially except in order to preserve a challenge that the summary judgment grounds are unclear or ambiguous. *McConnell*, 858 S.W.2d at 342-43. A party is not required to specially except in order to preserve a complaint that:

- the motion or response fails to present any grounds at all; or
- the motion or response presents some, but not all, possible grounds.

Id. at 342.

A party who files special exceptions to the summary judgment motion or response must obtain a ruling at or prior to the summary judgment hearing. In order to preserve error *McConnell*, 858 S.W.2d at 343 n.7. Some Texas courts of appeals further require that the ruling be express, under the premise that the granting of a summary judgment does not imply that the trial court overruled the special exceptions. *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 785 (Tex. App.—Houston [14th Dist.], no pet.); *Rosas v. Hatz*, 147 S.W.3d 560, 563 (Tex. App.—Waco 2004, no pet.); *cf.* Subsection VI(A)(2), *supra*. However, another court of appeals has held that a trial court's failure to rule on special exceptions in granting summary judgment implicitly overrules them. *Alejandro v. Bell*, 84 S.W.3d 383, 389 (Tex. App.—Corpus Christi-Edinburg 2002, no pet.).

VII. TWIST: NEWLY ADDED CLAIMS OR DEFENSES

One consequence of a motion for summary judgment may be an amended pleading injecting new claims or defenses into the lawsuit. A trial court must decide the summary judgment issues based on “the pleadings . . . on file at the time of the hearing” TEX. R. CIV. P. 166a(c). Because summary judgment may not be granted on a claim or ground not presented in the motion, a newly added claim or defense may preclude summary judgment, or prevent any favorable order from being final and appealable.

Texas Rule of Civil Procedure 63 provides that “[p]arties may amend their pleadings . . . provided, that any pleadings offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge [in a scheduling order] under

Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such amendments will operate as a surprise of the opposite party.” For purposes of Rule 63, a summary judgment hearing is within the meaning of “trial.” *Goswami*, 751 S.W.2d at 490. Absent a showing by the opposite party of surprise or prejudice, leave to amend a pleading within seven days of the summary judgment hearing should be granted. *See id.* Indeed, an appellate court will presume that such leave was granted, or will consider any error “cured,” if there is no showing of surprise or prejudice and the record does not indicate that the trial court refused to consider the amended pleading. *Id.* at 490-91; *see Honea v. Morgan Drive Away, Inc.*, 997 S.W.2d 705, 707 (Tex. App.—Eastland 1999, no pet.) (interpreting order stating that trial court considered all “timely” filings to indicate that court refused to consider late-amended pleadings).

Thus, the opposing party waives its objection to a pleading amended within seven days of the summary judgment hearing unless it objects and establishes surprise or prejudice. *See Goswami*, 751 S.W.2d at 490-91. On the other hand, the opposing party is not required to object or establish surprise or prejudice when a party attempts to amend its pleading *after* the summary judgment hearing. Rule 166a(c) does allow the trial court to render summary judgment on “the pleadings . . . filed [after [the time of the hearing] and before judgment *with permission of the court*” TEX. R. CIV. P. 166a(c) (emphasis added). When a party files an amended pleading after the summary judgment hearing but before a judgment is signed, that party bears the burden to demonstrate that leave was, in fact, obtained. *Leinen v. Buffington's Bayou City Serv. Co.*, 824 S.W.2d 682, 685 (Tex. App.—Houston [14th Dist.] 1992, no writ). Where nothing in the record shows that the trial court granted leave, appellate courts presume that the trial court refused to consider the late-filed amendment. *Id.*; *see also Hussong v. Schwan's Sales Enters.*, 896 S.W.2d 320, 323 (Tex. App.—Houston [1st Dist.] 1995, no writ) (presuming refusal to consider where record did not show trial court granted leave and judgment stated that court considered only *prior* pleadings referenced in the motion for summary judgment).

If the nonmovant successfully amends its pleadings to add new claims, the movant may have to amend its motion in order to obtain a final and appealable judgment. However, if the summary judgment motion is broad enough to encompass the later-filed claims (or defenses), the movant is not required to amend its motion in order to obtain a final and appealable judgment. For example, if a no evidence motion seeks summary judgment on the nonmovant's negligent causes of action because there

is no evidence of duty, causation, or breach, and the nonmovant amends its pleading to assert variations of other negligence claims – all of which sound in negligence and include essential elements of duty, breach, and causation – the movant is not required to amend in order to obtain summary judgment on both the initial and amended negligence claims. *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 436-37 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Or, if a movant has conclusively disproved an element central to all causes of action (original and amended), or if an unaddressed cause of action is derivative of the addressed causes of action, the movant is not required to amend. *O’Kane v. Coleman*, 2008 WL 2579832, *4 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet.) (mem. op.), citing *Dubose v. Worker’s Med., P.A.*, 117 S.W.3d 916, 922 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

VIII. TURN THREE: OTHER PRESERVATION CONSIDERATIONS

When a movant seeks summary judgment on attorneys’ fees and provides an affidavit of counsel, along with supporting billing statements, that evidence may be taken as true as a matter of law unless the nonmovant provides controverting evidence. See *InvestIN.com*, 2009 WL 2232225, at *9. Where the testimony of an interested witness is not contradicted by any other witness and is clear, positive, direct, and free from contradiction, it is taken as true as a matter of law. *Id.* Where the movant provides such evidence, and the nonmovant does not offer any competent summary judgment evidence to raise an issue of material fact on the amount of, necessity for, or reasonableness of the requested fees, there is no error in a summary judgment awarding those fees. *Id.*

IX. TURN FOUR: THE HEARING (OR SUBMISSION)

Until recently, there would have been little, if any, basis on which to request that a court reporter record the summary judgment hearing. In order to preserve error, the trial court’s ruling(s) would have had to be in writing. But now, as indicated above, an express oral ruling can be sufficient to preserve error. Or, statements by the trial court at a hearing may provide an indication in the record that a ruling can be implied.

In addition, when a summary judgment hearing also involves matters such as objections, exceptions, requests or motions for continuance, and other collateral issues, a reporter’s record is appropriate. For example, if objections to evidentiary defects in form are sustained, the offering party’s oral request for an opportunity to amend can preserve error. Or, if the summary judgment objections include *Daubert/Robinson* challenges, live testimony may be presented at the hearing on the objections.

Therefore, a party should request that the court reporter be present at and record the hearing. A call to the court reporter or court coordinator or clerk in advance of the hearing is advisable. Courts generally do not consider a court reporter’s attendance necessary at a summary judgment hearing, and it may be necessary to arrange for a visiting reporter or take other steps to accommodate the request.

X. TURN FIVE: THE DECISION

A. Traditional Summary Judgment

In a traditional summary judgment context, the movant bears the burden of proof. When deciding a summary judgment motion based on the evidence, the trial court must take the nonmovant’s evidence as true, indulge every reasonable inference in favor of the nonmovant, and resolve all doubts in favor of the nonmovant. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *Nixon v. Mr. Property Mgmt.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

When deciding a summary judgment motion seeking relief based on the pleadings, the court must also determine that any pleading defects cannot be cured by amendment. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994); *In re B.I.V.*, 870 S.W.2d 12, 13-14 (Tex. 1994). Summary judgment may be proper immediately if the pleading deficiency is of the type that could not be cured by an amendment, but otherwise, the trial court must give the nonmovant a reasonable opportunity to replead before granting summary judgment based on the pleadings. See *B.I.V.*, 870 S.W.2d at 13-14; *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

If the movant does not meet its burden of proof, the nonmovant does not have any burden at all. *Clear Creek*, 589 S.W.2d at 678-79. The trial court cannot grant summary judgment by default for a failure to respond if the movant has not established its entitlement to judgment by conclusive summary judgment evidence. *Id.* at 678. Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant does establish its right to judgment by conclusive proof, the burden then shifts to the nonmovant to avoid summary judgment. *Clear Creek*, 589 S.W.2d at 678-79; *Clarendon Nat’l Ins. Co. v. Thompson*, 199 S.W.3d 482, 486 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Once the nonmovant files summary judgment evidence, it is part of the “entire record” that must be considered under the standards set forth above (*i.e.*, taking nonmovant’s evidence as true, indulging all reasonable inferences in nonmovant’s favor, and resolving all doubts in its favor) when determining whether the nonmovant has satisfied its burden. See *Yancy v. United Surgical Partners Int’l*, 236 S.W.3d

778, 782 (Tex. 2007); *City of Keller*, 168 S.W.3d at 825-26.

1. Movant = Plaintiff

A plaintiff as movant must conclusively establish each element of its claims. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). In such a motion, the plaintiff is not required to address any affirmative defenses. *Cf. Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (placing burden on nonmovant to establish genuine issue of material fact on each element of affirmative defense). If the case also involves counterclaims against the plaintiff, and if the plaintiff seeks a final and appealable summary judgment, the plaintiff also must conclusively disprove at least one element of each counterclaim. *Schafer v. Federal Servs. Corp.*, 875 S.W.2d 455, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ.) Alternatively, the plaintiff may seek a partial summary judgment on one or more of its own claims or the nonmovant's counterclaims.

If the plaintiff makes its initial required showing and the burden shifts to the defendant, the defendant may satisfy its burden as to plaintiff's claims by identifying (in movant's evidence) or establishing (through nonmovant's own evidence) a genuine issue of material fact on *any* element of each cause of action, or on *every* element of the nonmovant's affirmative defense,⁶ or by establishing that, despite the facts, plaintiff is not entitled to recover as a matter of law. *See Brownlee*, 665 S.W.2d at 112 (regarding affirmative defense); *Clear Creek*, 589 S.W.2d at 678-79 (regarding genuine issue of material fact); *Thompson*, 199 S.W.3d at 486-87 (same); *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 91 (Tex. App.—Dallas 1996, writ denied) (regarding legal bar). If counterclaims are involved, the defendant may satisfy its burden by establishing a genuine issue of material fact on each element of the counterclaim(s). *Cf. Brownlee*, 665 S.W.2d at 112.

Even if the nonmovant meets this burden, the movant still may obtain summary judgment if it can show as a matter of law that there actually are no fact issues regarding its claims, or if it can negate as a matter of law at least one element of the affirmative defense or counterclaims.

2. Movant = Defendant

⁶ If the nonmovant relies on an affirmative defense to defeat summary judgment, the nonmovant bears the initial burden to present proper summary judgment evidence sufficient to raise an issue of fact on each element of the defense. *Brownlee*, 665 S.W.2d at 112. This is unlike a counterclaim, on which the movant bears the initial burden of proof. *See Adams v. Tri-Continental Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ).

A defendant as movant must either disprove at least one essential element of each of the plaintiff's claims, or plead and conclusively prove every element of an affirmative defense. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). If counterclaims are involved, the defendant as movant must conclusively establish each element of the counterclaims. *Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ) (imposing same burden as for plaintiff to obtain summary judgment on its claims); *see also Jones*, 710 S.W.2d at 60 (setting forth that burden).

If the defendant makes the initial required showing and the burden shifts to the plaintiff, the plaintiff may satisfy its burden by identifying (in movant's evidence) or establishing (through nonmovant's own evidence) a genuine issue of material fact on *any* element of the defendant's affirmative defense, or on *every* element of a counter-affirmative-defense, or by establishing that, despite the facts, defendant is not entitled to recover as a matter of law. *See, e.g., Ryland Group*, 924 S.W.2d at 121 (regarding counter-affirmative-defense); *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994) (same).

Even if the nonmovant meets this burden, the movant still may obtain summary judgment if it can show as a matter of law that there actually are no fact issues regarding its affirmative defenses or counterclaims, or if it can negate as a matter of law at least one element of each of the plaintiff's claims.

3. Scope of Review

In deciding a traditional summary judgment motion, the trial court should first review the evidence submitted by the movant to determine whether the initial burden of proof has been satisfied. *Clear Creek*, 589 S.W.2d 671, 678. If the court determines that the initial burden was met, the court should examine the entire record – including evidence presented by the nonmovant – in the light most favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Yancy*, 236 S.W.3d at 782.

B. No Evidence Summary Judgment

The nonmovant has the initial burden to produce summary judgment evidence raising a genuine issue of material fact regarding the elements as to which the movant has stated there is no evidence.⁷ TEX. R. CIV. P. 166a(i).

⁷ A non-movant has no burden to bring forward evidence on a non-challenged element of a claim. *Alaniz v. Hoyt*, 105 S.W.3d 330, 344 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.), *abrogated in part on other grounds by Fort Brown Villas III Condominium Ass'n v. Gillenwater*, 285 S.W.3d 879, 881-82 (Tex. 2009).

1. Legal Sufficiency Standard

A no-evidence summary judgment is essentially a pretrial directed verdict, and the same legal sufficiency standard applies as with regard to a motion for directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). The evidence is reviewed in the light most favorable to the non-movant where reasonable jurors could do so, disregarding all contrary evidence and inferences unless reasonable jurors could not. *See City of Keller*, 168 S.W.3d at 827; *Chapman*, 118 S.W.3d at 751 (citing *Havner*, 953 S.W.2d at 711). In determining how reasonable jurors would view the evidence, the court looks for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (citing *City of Keller*, 168 S.W.3d at 822); *see City of Keller*, 168 S.W.3d at 811-18 (discussing various permutations of evidence review that may alter conclusions about evidence under “reasonable juror” standard).

The no evidence challenge to an element should be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.” *Id.* Less than a scintilla of evidence exists when the evidence is “so weak as to do no more than create a mere surmise or suspicion” of a fact. *Id.* (citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). On the other hand, the trial court cannot grant summary judgment with regard to a challenged element if the nonmovant presents more than a scintilla of probative evidence to raise a genuine issue of material fact on that element. *Id.* More than a scintilla of evidence exists when the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Id.* (citing *Havner*, 953 S.W.2d at 711). Both direct and circumstantial evidence may be used to adduce the required amount of evidence. *See Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001).

2. Scope of Review

It is somewhat unclear whether evidence attached to a hybrid summary judgment motion should be considered in making the initial determination of whether the *nonmovant* satisfied its burden to present some evidence on each challenged element. However, several indicators in Texas Supreme Court opinions support the view that all evidence in the record, including evidence attached to a hybrid motion, must be considered in deciding whether the nonmovant has satisfied its own burden in the no evidence context.

The Texas Supreme Court has indicated that, in making the summary judgment decision, the court

“must consider all the summary judgment evidence on file” *City of Keller*, 168 S.W.3d at 825; *see also Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007) (reciting that reviewing court must consider “all the evidence” in the light most favorable to the nonmovant). To be sure, in a proceeding where summary judgment is sought only under Rule 166a(i), the only summary judgment evidence on file may be the “contrary” evidence attached to the response. *City of Keller*, 168 S.W.3d at 825. But regardless of whether the movant is required to provide evidence in support of its particular motion, the court is required to consider “all the summary judgment evidence on file” *See id.* And the Court, in stating the standard of review applicable to “a summary judgment motion pursuant to TEX. R. CIV. P. 166a(i),” has said that it will “review the evidence presented by the motion and response” through the lens favoring the nonmovant where reasonable jurors could. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006) (emphasis added).

An alternative view is that Rule 166a(i) does not provide for summary judgment evidence to be attached to a motion, and therefore, any attached evidence should be disregarded. *Mathis v. Restoration Builders, Inc.*, 231 S.W.3d 47, 52 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Binur*, 135 S.W.3d at 651). However, in *Binur*, the Texas Supreme Court indicated (in 2004) that, if a motion brought solely under Rule 166a(i) attached evidence, that evidence should not be considered “unless it creates a fact question” 135 S.W.3d at 651. This approach is consistent with a review of the entire record (including the evidence attached to a no evidence motion) in the manner most favorable to the nonmovant.

Thus, it appears that evidence attached to a hybrid motion (or erroneously attached to a strictly no evidence motion) will be considered by the trial court in determining whether the nonmovant has met its burden under Rule 166a(i). This factor should be considered in selecting what evidence is attached to a hybrid motion.

C. “Competing” vs. Parallel Summary Judgment Motions

Situations arise in which both sides move for summary judgment at the same time. In some cases, the summary judgment motions are “competing,” *i.e.*, both sides move for summary judgment on the same claims by the same party. *See, e.g., FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). In such a situation, neither party may prevail simply because the other failed to discharge his burden as movant on his or her own motion. *See James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied). Instead, each party must carry its own burden

as movant, and in response to the other party’s motion as nonmovant. *Id.* However, the trial court may consider all the summary judgment evidence in deciding whether to grant either motion. *Martin v. Harris Cty. Appraisal Dist.*, 44 S.W.3d 190, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The trial court even may rely on one party’s evidence to supply missing evidence in the other party’s motion. *Seaman v. Seaman*, 686 S.W.2d 206, 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

In other cases, each side moves for summary judgment on different claims asserted by different parties. For example, a plaintiff may move for summary judgment on the defendant’s counterclaims, at the same time that the defendant moves for summary judgment on the plaintiff’s claims. Although it is possible that the summary judgment rulings could dispose of the entire case, it is not necessarily a situation in which the grant of one motion compels the denial of the other, or vice versa.

XI. TWIST: FINALITY OF THE SUMMARY JUDGMENT

Because summary judgments may dispose of only part of a case or only some of the parties, it is difficult to tell in some cases whether a “summary judgment” is a final judgment or simply an interlocutory order. Appellate court jurisdiction is vested in cases where a final judgment has been rendered or a statute specifically authorizes an interlocutory appeal. *See Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985); *see also Stary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998). Thus, in general, an appeal lies only from a final judgment. *See Ross*, 698 S.W.2d at 365. Moreover, there generally can be only one final judgment in each lawsuit. *Id.* Whether or not any party raises the question of finality, the appellate court necessarily must determine that it has jurisdiction before deciding an appeal. *New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990); *Ross*, 698 S.W.2d at 365. Therefore, the issue may be raised *sua sponte*. *See Sanchez*, 799 S.W.2d at 678.

Tip: Double-check whether a statute authorizes an interlocutory appeal from your non-final summary judgment order. For example, does your order satisfy Texas Civil Practice and Remedies Code section 51.014(a)(5) or (6)? These subsections allow an interlocutory appeal when a district court, county court at law, or county court denies a motion for summary judgment that:

- is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

- is based in whole or in part on a claim against or a defense by
 - ★ a member of the electronic or print media, acting in such capacity or
 - ★ a person whose communication appears in or is published by the electronic or print media

arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Texas Civil Practice and Remedies Code].

TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5), (6). Or, is the summary judgment premised on another ruling from which an interlocutory appeal lies? This latter situation does not entitle you to appellate review of the summary judgment itself. *See Bobbitt v. Cantu*, 992 S.W.2d 709, 712 (Tex. App.—Austin 1999, no pet.) (stating principle that party is prohibited from using order that is subject to interlocutory appeal as a vehicle to carry non-appealable orders to the appellate court); *see also Art Institute of Chicago v. Integral Hedging, L.P.*, 129 S.W.3d 564, 570 n.8 (Tex. App.—Dallas 2003, no pet.) (noting that, if order denied a temporary injunction and directed payment of fees, appellate court would review only the denial of the injunction). However, as a practical matter, a reversal of the underlying ruling may compel the trial court to reconsider the summary judgment once the case proceeds in the trial court.

A. When is a summary judgment final?

Contrary to the presumption arising after a trial on the merits, a summary judgment is presumed to be interlocutory, *i.e.*, not appealable. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 829 (Tex. 2005); *Lehmann v. HarCon Corp.*, 39 S.W.3d 191, 199-200 (Tex. 2001). The summary judgment is final and appealable only if: (1) it actually disposes of all claims and parties before the trial court at the time of the judgment; or (2) it states with unmistakable clarity that it is a final judgment as to all claims and all parties. *Lehmann*, 39 S.W.3d at 192-93. This is a disjunctive test. A judgment that actually disposes of all parties and all claims is final regardless of its language; conversely, a judgment that fails to dispose of all claims still may be final if “‘intent to finally dispose of the case’” is “‘unequivocally expressed in the words of the order itself.’” *Burlington*

Coat, 167 S.W.3d at 830 (quoting *Lehmann*, 39 S.W.3d at 200).

In terms of the first option, the disposition of all claims and parties is not required to be ultra-specific. For example, a summary judgment order clearly disposing of all claims and parties is final even if it does not break down that ruling as to each element of the claims (e.g., duty, breach, causation, and damages). *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 617 (Tex. 2007) (citing as example *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 674-75 (Tex. 2004) (determining to be final a summary judgment in a premises liability case stating that “[n]o dangerous condition existed on the property as a matter of law” and “[t]he Defendant [sic] committed no acts of negligence in relation to this accident,” and entering judgment against the plaintiff)). Similarly, a summary judgment is not rendered insufficient simply because it makes a “lump sum” monetary award that does not specify what elements of damages or fees are included therein. See *Ford*, 235 S.W.3d at 617. A party may have an argument on appeal that the lump sum award is incorrect because it does not include the proper elements, but the lump sum format does not render the award interlocutory. *Id.*

However, a judgment that patently fails to address or dispose entirely of a claim does not satisfy the first standard. See, e.g., *Burlington Coat*, 167 S.W.3d at 830 (determining summary judgment that awarded damages “[o]n the claim of negligence” but failed to dispose of claim for exemplary damages based on gross negligence did not dispose of all claims). Likewise, a judgment that patently fails to address or dispose entirely of a party does not satisfy the first standard. See, e.g., *Merriweather v. King*, 2006 WL 2771866, at *2 (Tex. App.—Houston [14th Dist.] Sept. 28, 2006, no pet.) (mem. op.) (determining to be interlocutory an order granting summary judgment in favor of King in her capacity as executor, but making no mention of King in her individual capacity, and noting that Mother Hubbard clause did not overcome the order’s “plainly interlocutory character”). Nor is the first standard met when the precise amount awarded by the judgment cannot be determined. *Harris County Toll Road Auth. v. Southwestern Bell Tel., L.P.*, 263 S.W.3d 48, 54 (Tex. App.—Houston [1st Dist.] 2006), *aff’d*, 282 S.W.3d 59 (Tex. 2009). For example, where a summary judgment makes a lump sum monetary award without specifying (either in the order or in the record) the claim on which it is based, and further awards “all applicable pre and post-judgment interest at the maximum rate allowed by law,” the judgment is interlocutory where prejudgment interest would begin accruing on different dates depending on which claim the award was based (i.e.,

where calculating the interest is more than a simple ministerial act). *Id.* at 54-56.

In terms of the second option, the old “Mother Hubbard” clause previously approved in *Mafrige*⁸ – i.e., “all relief not granted is denied” – does not, in itself, satisfy the standard. *Id.* at 203-04 (overruling *Mafrige* to the extent that it held a “Mother Hubbard” clause alone rendered an otherwise interlocutory order final and appealable). Nor is it enough, in itself, that the summary judgment awards costs or interest. *Burlington Coat*, 167 S.W.3d at 830 (costs and interest); *Lehmann*, 39 S.W.3d at 205 (costs). And, even language stating that the prevailing party “is entitled to enforce this judgment through abstract, execution and any other process necessary” does not conclusively establish that the judgment is final. *Burlington Coat*, 167 S.W.3d at 830. One rationale for the treatment of such awards and language as inconclusive is that trial courts sometimes use the same wording in interlocutory judgments that are intended to become final eventually, but only when other claims are later adjudicated. *Id.*

What type of language is considered to be clear and unequivocal? The example of “unmistakable clarity” provided by the Court is language such as “this judgment finally disposes of all parties and claims and is appealable.” *Lehmann*, 39 S.W.3d at 206. Alternatively, a statement that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties. *Ritzell v. Espeche*, 87 S.W.3d 536, 537-38 (Tex. 2002) (quoting *Lehmann*, 39 S.W.3d at 205); see also, e.g., *Hodde v. Portanova*, 2001 WL 224940, at *1 (Tex. App.—Houston [14th Dist.] Mar. 8, 2001, no pet.) (not designated for publication) (finding to be final a summary judgment that listed only 3 of the 5 defendants, but that also stated that plaintiffs, who were the only parties asserting claims in the lawsuit, “take nothing by their action”). Although the safest course is to include *Lehmann*’s sample language in a final summary judgment order, it is possible that language providing a lesser degree of clarity may be held sufficient. See, e.g., *Capstead Mortgage Corp. v. Sun Am. Mortgage Corp.*, 45 S.W.3d 233, 235 (Tex. App.—Amarillo 2001, no pet.) (finding to be final a summary judgment stating that “[a]s a result of the other orders signed on this date, this is a final judgment.”).

B. What If I Can’t Tell Whether the Judgment is Final?

If, after you examine the summary judgment, any doubt exists as to the finality of the order – whether

⁸ *Mafrige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993), overruled in part by *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 204 (Tex. 2001).

because the order could be construed to dispose of all claims and parties, or because language in the order could be interpreted by a court as unequivocally expressing an intent that the order be final – the prudent course is to file a notice of appeal. If a judgment purports to dispose of all claims and parties, the appellate deadlines begin running *even if the judgment does not actually dispose of all claims and/or parties*. *Lehmann*, 39 S.W.3d at 204; *see also Ritzell*, 87 S.W.3d at 537-38 (determining that summary judgment was final, even if it may have improperly disposed of a claim not properly presented for summary judgment); *Jacobs v. Satterwhite*, 65 S.W.3d 653, 655 (Tex. 2001) (determining summary judgment to be final, but erroneous, where it disposed of breach of contract claim not addressed in motion).

Take, for instance, a summary judgment order stating that it “finally disposes of all parties and claims and is appealable,” even though the movant sought summary judgment against only one of several independent claims. *See Lehmann*, 39 S.W.3d at 204. A motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on those grounds alone. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1996); *McConnell*, 858 S.W.2d at 341. Thus, the trial court in our example was not empowered to grant summary judgment on all the claims in the suit, and the judgment is erroneous. *See Science Spectrum*, 941 S.W.2d at 912; *McConnell*, 858 S.W.2d at 341. Yet, unless the summary judgment is timely appealed, its language will be taken at face value and the erroneous judgment will become final. *See Lehmann*, 39 S.W.3d at 204; *see also Ritzell*, 87 S.W.3d at 538; *Jacobs*, 65 S.W.3d 655.

In determining whether the summary judgment on appeal is final, the appellate court should look to the judgment’s four corners, as well as the appellate record. *Lehmann*, 39 S.W.3d at 205-06. For instance, in examining whether all claims have been disposed, the court should review the judgment and record to identify the claims that were asserted, the claims that the summary judgment motion addresses, and the claims that the judgment addresses. *See id.*

If the appellate court determines that the judgment, in fact, is *not* final, the court should dismiss the appeal for want of jurisdiction, unless a statute provides for interlocutory appeal in the particular case. *Rotella v. Nelson Architectural Eng’rs, Inc.*, 251 S.W.3d 216, 218 (Tex. App.—Dallas 2008, no pet.); *see also Bobbitt v. Stran*, 52 S.W.3d 734, 735 (Tex. 2001) (holding that court of appeals was correct to dismiss appeal because the summary judgment appealed from was not final). Alternatively, if the circumstances are such that the trial court intended to and could have, but did not, render a final judgment,

the order may be treated as “premature” under Rule 27.2. *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001). In that case, the appellate court may abate the appeal to allow the trial court to modify its order so as to be final, with the modified order and all related proceedings to be included in a supplemental record. TEX. R. APP. P. 27.2; *see McNally*, 52 S.W.3d at 196.

C. What Are My Options If the Order in My Case Is Not a Final Judgment?

If, after you examine the summary judgment, there is no doubt that the order is interlocutory, are there any options for review before the remainder of the case is resolved? One possible option is to sever all of claims disposed by the summary judgment into a separate case, thereby making the interlocutory order a final judgment. *E.g., Carbon El Norteno, L.L.C. v. Sanchez*, 2008 WL 3971554, at *1-2 (Tex. App.—Corpus Christi-Edinburg Aug. 28, 2008, no pet.) (mem. op.); *see also Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 523 (Tex. 1982). Texas Rule of Civil Procedure 41 provides that “[a]ny claim against a party may be severed and proceeded with separately.” TEX. R. CIV. P. 41. Accordingly, a claim may be properly severed if it is part of a controversy which involves more than one cause of action. *Forderhause*, 641 S.W.2d at 528. And, in the matter of severance, a trial judge has broad discretion. *Id.*

Severance after a partial summary judgment, in order to expedite appellate review, generally falls within the trial court’s discretion. *See id.* at 529. However, the practitioner should give thought to strategic considerations – such as the prosecution and trial of the remaining claims, complications if the summary judgment is reversed and the claims are remanded for further proceedings in the now-severed case, and the impact on the main case from issues that necessarily would be decided on appeal of a severed judgment – in deciding whether to move for or oppose severance to expedite appellate review of a partial summary judgment.

Another possible option is an interlocutory appeal under Texas Civil Practice and Remedies Code section 52.014(d). This option would apply if the interlocutory summary judgment was signed in a civil case by a district court, county court at law, or county court. TEX. CIV. PRAC. & REM. CODE § 51.014(d). Such a court may issue a written order for interlocutory appeal of an order not otherwise appealable under section 51 if:

- (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.⁹

XII. TURN SIX: APPEALING THE SUMMARY JUDGMENT

Once you've determined that an adverse summary judgment order is final and appealable (or arguably so) or subject to an interlocutory appeal, it's time to file that notice of appeal and get going.

A. The Appellate Record and Consequences of Incompleteness

In the past, only a clerk's record would be requested and filed in the appellate courts. Now, it is entirely possible that a reporter's record exists. In addition, it is possible that reporter's records of other, collateral hearings might provide context and additional facts to indicate whether one or more summary judgment rulings are implied.

Although the clerk and reporter are responsible generally for the timely filing of the clerk's and reporter's records on appeal, the appellant is required to make arrangements for payment of costs (unless appellant is entitled to appeal without payment of those costs). TEX. R. APP. P. 35.3(a)(2), (b)(2). In the courts of appeals, the docketing statement will have a space for the appellant to indicate whether such arrangements have been made. Although a docketing statement is not jurisdictional (*id.* 32.4), it is useful to get the ball rolling with regard to requesting the clerk's and reporter's records. Indeed, if the appeal is one of the rare interlocutory appeals of a summary judgment ruling, the records will be due a mere 10 days after the notice of appeal is filed. TEX. R. APP. P. 26.1(b), 28.1(a), & 35.1(b).

Requesting the clerk's record involves reviewing the filings from the trial court and deciding which papers are necessary, relevant, and/or helpful in deciding the issues to be presented on appeal. Requesting the reporter's record involves reviewing

the hearings that were recorded and determining whether any rulings, admissions, stipulations, agreements, discussions, or evidence admitted at those hearings are necessary, relevant, and/or helpful in deciding the issues to be presented. Both the appellant and appellee should perform this review; the appellee may request additional items to be included in the clerk's record, or additional hearing transcripts to be filed as the reporter's record. *See* TEX. R. APP. P. 34.5(b), 34.6(a).

Although Rule 34.5(a) sets forth a list of trial court filings that must be included in a clerk's record on appeal, that list is geared toward an appeal of a judgment after trial. *See* TEX. R. APP. P. 34.5(a). For instance, the list does not mention summary judgment motions, responses, replies, objections, exceptions, or motions for continuance. *Id.* Regardless of which party bore the burden of proof below, the appellant bears the burden to bring forward the record necessary to decide the issues on appeal. *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004).¹⁰ If pertinent papers, *e.g.*, summary judgment evidence, before the trial court at the time of the summary judgment are not included in the appellate record, the appellate court will presume that the omitted evidence supports the trial court's judgment. *Id.* Alternatively, omitted portions of the record may result in waiver of all objections other than legal insufficiency. *E.g.*, *Pierson v. SMS Fin. II, L.L.C.*, 959 S.W.2d 343, 348 (Tex. App.—Texarkana 1998, no pet.).

Therefore, it is critical that appellant's counsel conduct his or her own review of the trial court filings and work with the clerk below to ensure that all necessary papers are included in the clerk's record. Likewise, it is essential that appellant's counsel arrange for the filing of any reporter's records relevant to express oral rulings, implied rulings, objections and other error preservation, or any other pertinent matter.

If a party discovers that a necessary filing has been omitted from the clerk's record, supplementation of the record is generally available. *See* TEX. R. APP. P. 34.5(c). Under Rule 34.5(c), supplementation of the clerk's record is somewhat liberally allowed. However, supplementation after the appeal has been argued (or submitted without argument) is highly disfavored. *See, e.g., Texas First Nat'l Bank v. Ng*,

⁹ In the 81st Legislature Regular Session of the Texas Legislature, Senate Bill 1384 (authored by Senator Huffman) proposed changes to this subsection. Tex. S.B. 1384, 81st Leg., R.S. (2009), available online at <http://www.capitol.state.tx.us/tlodocs/81R/billtext/html/SB01384I.htm>, or on Westlaw at 2009 TX S.B. 1384. The Bill would have removed the requirement for the parties' agreement from provision (1), as well as deleting provision (3). *Id.* The Bill was introduced and referred to the Committee on Jurisprudence, but did not proceed further before the end of the regular session. *See* S.J. OF TEX., 81st Leg., R.S. 558 (2009) (recording committee referral), with subsequent history available online at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=SB1384>.

¹⁰ Before the 1997 amendments to the Texas Rules of Appellate Procedure, the responsibility and burdens relating to the clerk's record were apportioned to the appellant, not shared with the clerk. *See, e.g.,* TEX. R. APP. P. 50(d) (Vernon 1996) (repealed). Therefore, older case law addressing presumptions in a summary judgment appeal arising as a result of an incomplete appellate record may or may not be useful, depending on the circumstances and issues addressed.

167 S.W.3d 842, 866 (Tex. App.—Houston [14th Dist.] 2005, judgment vacated by agr.).

B. Standard and Scope of Review

Appellate courts review summary judgments *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Chapman*, 118 S.W.3d at 750. The appellate courts are limited to the evidence presented to the trial court. *Restoration Builders*, 231 S.W.3d at 52; *West*, 917 S.W.2d at 877-78.

Similarly, appellate courts cannot affirm a summary judgment based on a ground not presented to the trial court in the motion. *Stiles*, 867 S.W.2d at 26. If a summary judgment grants more relief than requested (e.g., by disposing of issues never presented to it), but also grants some relief addressed by the summary judgment motion, the appellate court must: (1) reverse and remand as to the issues never presented to the trial court; but (2) in the interest of judicial economy, address the merits of the properly presented claims. *Bandera Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

1. Traditional Summary Judgment

The question on appeal is whether the movant established that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Nixon*, 690 S.W.2d at 548; *Totman v. Control Data Corp.*, 707 S.W.2d 739, 742 (Tex. App.—Fort Worth 1986, no writ), *abrogated in part on other grounds by Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645-46 (Tex. 1995) (regarding jurat in affidavit).

2. No Evidence Summary Judgment

A no-evidence summary is reviewed by the appellate courts under a legal sufficiency standard. *Chapman*, 118 S.W.3d at 750-51. This is the same standard used by the trial court in making its own ruling. See Section X(B)(1), *supra*. Previously, some courts had applied a *de novo* standard of review to no evidence motions. See, e.g., *Keszler*, 105 S.W.3d at 125. Because the standard employed by the trial court also is legal sufficiency, *de novo* review would take the reviewing court to the same place pinpointed by *Chapman* and *City of Keller*. The evidence is reviewed in the light most favorable to the non-movant where reasonable jurors could do so, disregarding all contrary evidence and inferences unless reasonable jurors could not. See *City of Keller*, 168 S.W.3d at 827; *Chapman*, 118 S.W.3d at 751 (citing *Havner*, 953 S.W.2d at 711).

3. Other Applicable Standards of Review and Presumptions

Admission or exclusion of summary judgment evidence. Any trial court rulings concerning the admission or exclusion of summary judgment evidence

are reviewed under an abuse of discretion standard. See *Sanders v. Shelton*, 970 S.W.2d 721, 727 (Tex. App.—Austin 1998, writ denied). To obtain a reversal of the summary judgment based on an erroneous evidentiary ruling, the appellant must show that: (1) the ruling constituted error; and (2) the error was reasonably calculated to cause and probably did cause the rendition of an improper verdict. *Id.* There is no reversible error if the evidence in question is cumulative or is not controlling on a material issue dispositive of the case. *Id.*

Exclusion of summary judgment evidence based on untimely discovery response. A trial court's exclusion of an expert who has not been properly designated is reviewed for abuse of discretion. *Gillenwater*, 285 S.W.3d at 881.

Untimely filed or untimely served response. Where nothing appears of record to indicate that a party had leave to untimely file a summary judgment response, an appellate court will presume that the trial court did not consider the untimely filed response or evidence. *Crowder*, 919 S.W.2d at 663; *Bryant*, 686 S.W.2d at 615. However, at least one Texas court of appeals has held that this presumption is tied to filing only, not service. Thus, if a summary judgment response is filed timely but served late, no presumption arises. *Simulis, L.L.C. v. General Elec. Capital Corp.*, 2008 WL 1747483, at *3 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (mem. op.) (concluding no presumption arose where affidavit was properly filed on deadline date in Harris County after-hours filing box, even though affidavit was served by fax after 5:00 p.m. on the same day).

Adequate time for discovery. Appellate review of a decision on whether an “adequate time” for discovery preceded a no evidence summary judgment is conducted under an abuse of discretion standard. *Johnson*, 167 S.W.3d at 467; *Restaurant Teams*, 95 S.W.3d at 339. Likewise, the grant or denial of a continuance under Rule 166a(g) is reviewed for abuse of discretion. *Rocha*, 69 S.W.3d at 318-19. However, a party who fails to establish that it diligently used the rules of discovery is not entitled to a continuance. *Id.* at 319.

Denial of motion for continuance of summary judgment hearing. A ruling on a motion to continue the summary judgment hearing is reviewed for abuse of discretion. *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 161 (Tex. 2004). Whether the ruling constitutes an abuse of discretion requires a case-by-case evaluation. *Id.* Some of the relevant factors – *i.e.*, the length of time the case had been on file, the materiality and purpose of the discovery sought, and the requesting party's due diligence – are discussed above in Section VI(C)(1) & (2). See also *id.*

Attorney's fees award. When an attorneys' fees affidavit is controverted by an opposing attorney's affidavit, the trial court cannot grant an award of fees by summary judgment. *General Elec.*, 857 S.W.2d at 601-02 (stating principle and collecting cases). Where the amount of attorneys' fees is not conclusively established, the appellate court may partially remand the case for a determination of reasonable attorneys' fees only. *Woods Expl. & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 571 (Tex. 1975); *General Elec.*, 857 S.W.2d at 602.

4. "Competing" vs. Parallel Summary Judgment Motions

When the summary judgment is based on "competing" motions (*i.e.*, both sides moved for summary judgment on the same claims by the same party) and the trial court granted one motion and denied the other, the reviewing court should review both sides' summary judgment evidence together and determine all questions presented. *FM Properties*, 22 S.W.3d at 872. In this context, the appellate court may review both the grant and denial of the summary judgment motions. *James*, 742 S.W.2d at 703. The court may determine all questions presented. *Calhoun v. Killian*, 888 S.W.2d 51, 54 (Tex. App.—Tyler 1994, writ denied). The court may affirm the summary judgment; reverse and render a judgment for the other party, if appropriate; or reverse and remand if neither party has met its summary judgment burden *Id.*; *see also FM Properties*, 22 S.W.3d at 872.

On the other hand, when each side has obtained summary judgment by way of motions addressing different claims (*i.e.*, one motion addressing the plaintiff's claims and the other motion addressing the defendant's counterclaims), each summary judgment motion should be reviewed independently for affirmance or remand. *See, e.g., Nixon*, 690 S.W.2d at 548-49.

C. Issues for the Brief: General Judgments vs. Specific Judgments

A summary judgment that grants relief without stating the grounds therefore is considered a "general judgment." A summary judgment stating the reasons that the trial court granted relief is a "specific judgment." Regardless of any oral statements made by the trial court, the only reasons that "count" are those, if any, included in the court's written order. *Richardson v. Johnson & Higgins of Tex., Inc.*, 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (not reasons stated orally); *see also Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 859 (Tex. App.—Texarkana 1996, no writ) (not reasons stated in letter); *Shannon v. Texas Gen'l Indem. Co.*, 889 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1994, no writ) (same). If the trial court provides specific reasons orally or in a letter, but not in the written order, the

summary judgment is a "general judgment." *See Hailey*, 935 S.W.2d at 859; *Richardson*, 905 S.W.2d at 11; *Shannon*, 889 S.W.2d at 664.

1. General Judgments

When the trial court grants a general summary judgment (*i.e.*, does not state the grounds or reasons for its ruling), the appellate court must affirm the summary judgment if any one of the movant's stated theories has merit. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993). Therefore, the appellant must challenge every summary judgment ground.

The statement of an issue or point in an appellate brief will be treated as covering every subsidiary question that is fairly included. TEX. R. APP. P. 38.1(f), 53.2(f), 55.2(f). The scope of this rule is counterbalanced by the rule requiring a brief or petition to contain a clear and concise argument of the contentions made, with appropriate citations to authorities and to the appendix or record. *Id.* 38.1(i), 53.2(i), 55.2(i); *see also In re TCW Global Project Fund II, Ltd.*, 274 S.W.3d 166, 171 (Tex. App.—Houston [14th Dist.] 2008, mand. filed).

When a trial court has granted a general summary judgment, the best approach is to include in the brief a general issue or point such as: THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT. *Malooly Bros. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). Such language is sufficient to preserve error and to allow argument in the brief as to all possible grounds upon which summary judgment should have been denied. *Plexchem Int'l, Inc. v. Harris Cty. Appraisal Dist.*, 922 S.W.2d 930, 930-31 (Tex. 1996). The scope includes arguments about whether the evidence raised a genuine issue of material fact was raised, as well as non-evidentiary issues such as the legal interpretation of a statute. *Moore v. Shoreline Ventures, Inc.*, 903 S.W.2d 900, 902 (Tex. App.—Beaumont 1995, no writ); *Cassingham v. Lutheran Sunburst Health Serv.*, 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ).

The general issue provides the opportunity for the appellant to present argument on all available grounds. *Morris v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 863 (Tex. App.—San Antonio 1997, no writ). However, in order to use this opportunity, the appellant must provide briefing on those grounds. *McCoy v. Rogers*, 240 S.W.3d 267, 272 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Cruikshank v. Consumer Direct Mortgage, Inc.*, 138 S.W.3d 497, 502-03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). When an appellant writes a general issue and briefs every ground raised by the summary judgment motion, there is no waiver at the briefing stage. *See, e.g., Plexchem Int'l*, 922 S.W.2d at 931; *TCW Global*, 274 S.W.3d 166, 171. But, if the appellant fails to brief a ground

asserted below in support of summary judgment, the *Malooly* point will not prevent waiver. *E.g.*, *McCoy*, 240 S.W.3d at 272; *Cruikshank*, 138 S.W.3d at 502-03; *Morriss*, 948 S.W.2d at 871. Likewise, if the appellant uses specific issues and does not include a general *Malooly* point, the failure to assign a specific issue to even one ground results in waiver. *See e.g.*, *Fluid Concepts, Inc. v. DA Apts. L.P.*, 159 S.W.3d 226, 231 (Tex. App.—Dallas 2005, no pet.); *Evans v. First Nat'l Bank*, 946 S.W.2d 367, 377 (Tex. App.—Houston [14th Dist.] 1997, writ denied). And in this situation, waiver of your challenges to even one ground below will result in affirmance of at least part of the general judgment (depending on how many claims or parties the waived ground applies to). *E.g.*, *McCoy*, 240 S.W.3d at 272-73; *Fluid Concepts*, 159 S.W.3d at 231; *Morriss*, 948 S.W.2d at 871; *Evans*, 946 S.W.2d at 377.

If you discover that a ground for summary judgment has been omitted from your brief inadvertently, be aware that courts of appeals have discretion to order/allow rebriefing in lieu of deeming waiver. *Fredonia State Bank v. General Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994). Where the inadvertent omission could lead to waiver of the entire appeal, a court of appeals may be more likely, under the principle that appeals preferably should be determined on the merits rather than waiver, to allow rebriefing. *Cf. Sadler v. Bank of Am.*, 2004 WL 1392325, *3 (Tex. App.—San Antonio June 23, 2004, no pet.) (mem. op.) (declining to base opinion on briefing inadequacies where waiver of one issue would require affirmance of entire appeal); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (construing issues liberally to obtain a just, fair and equitable adjudication of the litigants' rights); TEX. R. APP. P. 38.9(b) (allowing rebriefing).

Because a general point of error does not relieve the appellant of the duty to present argument, authority, and record citations (as appropriate) on every ground, it will assist the reviewing court if you include subissues that attack the various grounds on a more specific level. That said, the ultimate value of including scores of subissues in the brief is questionable. Even in a situation in which one has to *brief* every ground advanced by the movant below, including almost one hundred subissues (*Davis v. Pletcher*, 727 S.W.2d 29, 32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.)) seems counterproductive and overwhelming. Nevertheless, the basic concept of using some subissues that cover entire groups of grounds, to give the court a road-map-meets-checklist, is a good idea.

Tip: Don't forget that the Texas Rules of Appellate Procedure require you to include the subject matter of each issue or point, or

group of issues or points, in the table of contents of your brief or petition. TEX. R. APP. P. 38.1(b), 53.2(b), 55.2(b). Many judges use the table of contents to get an overview of your argument. Including the substance of your issues, as well as headings that are as persuasive as they are informative, can orient your audience and begin the advocacy process.

2. Specific Judgments

- a. The reviewing court should consider all grounds that the appellee preserves for appellate review and that are necessary to dispose of the appeal

When reviewing a summary judgment granted on specific grounds, the judgment generally may be affirmed only if the ground on which the trial court granted relief is meritorious. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625-26 (Tex. 1996); *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 178 (Tex. App.—Fort Worth 2004, pet. denied). However, if the *appellee* preserves other grounds that were presented in the summary judgment motion but not ruled on by the trial court, the court of appeals must also consider any such grounds. *Cates*, 927 S.W.2d at 626; *Westchester Fire*, 152 S.W.3d at 178. To preserve these grounds, the *appellee* must raise them in the summary judgment proceeding and present them in an issue or cross-point on appeal.¹¹ *Cates*, 927 S.W.2d at 625-26; *Westchester Fire*, 152 S.W.3d at 178; *but see City of Houston Fire Fighters' v. Morris*, 949 S.W.2d 474, 476 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (stating that a specific “summary judgment may be affirmed on any ground asserted in the motion that has merit,” without requiring *appellee* to preserve by presenting on appeal).

- b. Appellant should object to a specific judgment based on ground not in the motion below

A trial court is not allowed to grant summary judgment on a ground not presented to it in the motion. TEX. R. CIV. P. 166a(c), (i); *McConnell*, 858 S.W.2d at

¹¹ Any party who seeks to alter the trial court's judgment must file a notice of appeal. TEX. R. APP. P. 25.1(c). The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court, except for just case. *Id.* If any party timely files a notice of appeal, another party may file a notice of appeal within the regular time period or 14 days after the first-filed notice of appeal, whichever is *later*. *Id.* 26.1(d). A 1996 case finding that the *appellee* preserved an unruled-upon ground for review by developing the argument in the *appellee's* brief was decided before Rule 25.1 became effective. *See Bennett v. Computer Assocs. Int'l*, 932 S.W.2d 197, 205 (Tex. App.—Amarillo 1996, writ denied). It is unclear whether simply including the issue in an *appellee's* brief still preserves error in accordance with the “issue or cross-point” statement in *Cates*.

341. A summary judgment that exceeds the scope of the grounds presented must be reversed *unless* the complaint is waived. In order to preserve the complaint, the appellant must state an issue or point in its brief, complaining of the trial court's error or arguing that the trial court granted relief that exceeded the permissible scope. See *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 942 (Tex. App.—San Antonio 1996, no writ).

D. A Few Words on Argument in the Brief

Thoroughness in briefing is key. As an example, to the extent that the briefing party asserts an “adequate time” for discovery challenge to a no evidence summary judgment, the brief must specifically address the factors showing an inadequate time for discovery, or else the issue may be deemed waived. *Robertson v. Southwestern Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 903 (Tex. App.—Dallas 2006, no pet.). This gives you a flavor of the specificity that courts expect when briefing summary judgment appeals.

A general issue, or even a specific one, can only take you so far. In the end, you have to provide argument and authority – both case law and citations to the record – to point the appellate courts in the right direction. TEX. R. APP. P. 38.1(i), 53.2(i), 55.2(i); see also *TCW Global*, 274 S.W.3d at 171. Particularly if the summary judgment record is voluminous, a general issue stating that the trial court erred may have initially preserved your argument for review, but it's not going to help the appellate court actually perform the review. See *A.C. Collins Ford, Inc. v. Ford Motor Co.*, 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied). Spend time outlining the specific judgment or all the grounds stated by the movant below. Don't feel that you have to stick with the same order as was used in the trial court; organize your brief so that it is as helpful, clear, and easy to follow as possible. At the end of the day, you want to walk the appellate court through the opinion you'd like to receive.

XIII. TWIST: DEFAULT SUMMARY JUDGMENT

When a trial court grants a no evidence summary judgment by default based on the nonmovant's failure to file a response, does the *Craddock*¹² standard apply to a motion for new trial? The Texas Supreme Court has answered this question in the negative where the (summary judgment) nonmovant had an opportunity to seek a continuance or obtain permission to file a late response. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002). The Court reserved the question of whether the *Craddock* standard applies when a nonmovant discovers its

mistake after the summary-judgment hearing or rendition of judgment. *Id.*

When the nonmovant fails to file a response but has an opportunity to seek a continuance or obtain leave to file untimely, a “good cause” standard applies. *Carpenter*, 98 S.W.3d at 688; *Limestone Constr., Inc. v. Summit Commercial Indus. Properties, Inc.*, 143 S.W.3d 538, 543 (Tex. App.—Austin 2004, no pet.). This standard is similar to the first and third elements of the *Craddock* standard, requiring the nonmovant to show: (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake; and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. *Carpenter*, 98 S.W.3d at 688; *Limestone Constr.*, 143 S.W.3d at 543 & n.7.

XIV. TWIST: REVIEW OF DENIALS OF CERTAIN SUMMARY JUDGMENT MOTIONS

In general, an order denying a summary judgment motion is interlocutory and cannot be appealed. See *Novak v. Stephens*, 596 S.W.2d 848, 849 (Tex. 1980). Nor does a denied summary judgment motion generally preserve any points raised therein for appellate review, *i.e.*, they must timely reasserted as the case moves forward. *United Parcel Serv., Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916 (Tex. App.—Houston 2000 pet. denied). However, there are a few exceptions to these principles. When appellate review is available, the same standard of review which governs the granting of a summary judgment applies to the denial of a summary judgment. *HBO v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (stating standard and collecting cases).

1. Interlocutory Appeals Under Section 51.014

Section 51.014 of the Texas Civil Practice and Remedies Code contains two provisions authorizing interlocutory appeals when a district court, county court at law, or county court denies a motion for summary judgment that:

- is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;
- is based in whole or in part on a claim against or a defense by
 - ★ a member of the electronic or print media, acting in such capacity or
 - ★ a person whose communication appears in or is published by the electronic or print media arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas

¹² *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (1939).

Constitution, or Chapter 73 [of the Texas Civil Practice and Remedies Code].

TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5), (6).

2. Denial of a “Competing” Summary Judgment Motion

As mentioned above, when parties file “competing” summary judgment motions, and the trial court grants one and denies the other, the appellate court may review both the grant *and denial* of the summary judgment motions. *James*, 742 S.W.2d at 703. Thus, the party whose motion was denied should file a notice of appeal from both the granting of the opponent’s motion *and* the denial of his/her own. *City of Denison v. Odle*, 808 S.W.2d 153, 156 (Tex. App.—Dallas 1991), *rev’d on other grounds*, 833 S.W.2d 935 (Tex. 1992).

3. Interlocutory Appeal by “Agreement”

Also as mentioned above, Texas Civil Practice and Remedies Code section 52.014(d) allows an interlocutory appeal in certain instances where the parties and the trial court agree. If the interlocutory summary judgment is signed in a civil case by a district court, county court at law, or county court, the court may issue a written order for interlocutory appeal of an order not otherwise appealable under section 51 if:

- (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;
- (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
- (3) the parties agree to the order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d).

